Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

VERNON D. TORGERSON
and
BARBARA TORGERSON,

Petitioners,

VS.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Appellants herein, Vernon D. Torgerson and his wife, Barbara Torgerson, pled guilty to mail fraud and were sentenced by the trial court. After pleading guilty and sentencing, the Defendants found out information that caused them to file an appeal of the guilty plea and sentence. During the Appellate process they discharged their attorney, Charles Butts. The Appellants' pro se raised issues in the appeal in the general category of ineffective assistance of counsel. In that appeal the Fifth Circuit Court of Appeals would not address these issues for the following reason, as quoted from the Fifth Circuit:

> "The District Court has had no opportunity to develop the record of these claims, and we decline to address them without prejudice to Appellants' right to raise the issues in a Section 2255 Habeas Motion".

The Appellants herein filed a Title 28, Section 2255 Habeas Motion in the United States District Court for the Western District of Texas, San Antonio Division, requesting a hearing to develop the ineffective assistance of counsel claim. The District Court denied the Appellants' Motion to Vacate, Set Aside or Correct the Sentence without giving the Appellants an opportunity to have a hearing to present testimony and evidence supporting their Title 28, Section 2255 Habeas Motion. The Fifth Circuit Court of Appeals affirmed the Trial Court and denied a Petition for Panel Rehearing.

Has this action by the Trial Court and the Fifth Circuit Court of Appeals been in direct conflict with the decisions of other United States Court of Appeals concerning the same issues, and, furthermore, have the District Court's and Fifth Circuit's actions so far departed from the acceptable and useable course of judicial proceedings so as to call for an exercise of the Supreme Court of the United States' power of supervision on this matter?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the undersigned counsel certifies that the following persons have an interest in the outcome of this cause:

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H. F. Garcia
United States District Judge
(Judge who denied the 2255 Motion)
United States District Court for the
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San Antonio Division
Hemisfair Plaza
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The Honorable Emilio M. Garza
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GENERIC DESCRIPTION OF LARGE GROUP OF PERSONS-PURSUANT TO FIFTH CIRCUIT LOCAL RULE 28.2.1

The undersigned would advise the Court that there were numerous character references written to the trial court by various individuals on behalf of the Torgersons. The undersigned feels it is unnecessary to list the names and addreses of all those individuals but did want to advise the Court that this group existed.

THERE ARE NO OTHER PERSONS, FIRMS, PARTNERSHIPS, OR CORPORATIONS KNOWN THAT HAVE AN INTEREST IN THIS CASE.

THERE ARE ALSO NO OTHER KNOWN VICTIMS BY THE DEFENDANTS FOR THIS PARTICULAR CASE.

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VERNON D. TORGERSON
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VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners, Vernon D. and Barbara Torgerson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the Trial Court's decision denying them a Title 28, Section 2255 Habeas Hearing on the grounds of ineffective assistance of counsel.

OPINIONS BELOW

1. The opinion of the United States Magistrate for the United States District Court, Western District of Texas, San Antonio Division, in regard to Vernon Torgerson, dated January 29, 1993, appearing as Appendix "A" of this Petition.

2. The opinion of the United States Magistrate for the United States District Court, Western District of Texas, San Antonio Division, in regard to Barbara Torgerson, dated January 29, 1993, appearing as Appendix "B" of this Petition.

3. The joint opinion of H. F. Garcia, United States District Judge in the United States District Court for the Western District of Texas, San Antonio Division, concerning Vernon Torgerson and Barbara Torgerson dated April 7, 1993, appearing as Appendix "C" of this Petition.

4. The opinion of the Fifth Circuit Court of Appeals recorded as United States of America vs. Vernon Torgerson, 93-8280 and United States of America vs. Barbara Torgerson, 93-8281 appearing as Appendix "D" of this Petition.

5. The denial of the Petition for Panel Rehearing from the United States Court of Appeals for the Fifth Circuit recorded as United States of America vs. Vernon Torgerson, 93-8280 and United States of America vs. Barbara Torgerson, 93-8281, appearing as Appendix "E" of this Petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

The Opinion of the Fifth Circuit Court of Appeals affirming the District Court's denial of the Petitioners' Title 28, Section 2255 Motion is dated January 10, 1994 and the Petition for Panel Rehearing was denied by the Fifth Circuit Court of Appeals without opinion on February 22, 1994. The jurisdiction of this Court is based upon 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 1341,

> **Frauds and swindles**
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed,

any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000.00 or imprisoned not more than 30 years, or both.

28 U.S.C. Section 2255,

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE.

A. COURSE OF PROCEEDING

On October 19, 1990, a criminal indictment was brought against Barbara H. Torgerson and her husband, Vernon D. Torgerson, consisting of thirteen counts of mail fraud alleging violations of Title 18, United States Code, Section 1341.

On January 14, 1991, a guilty plea was entered by both Vernon Torgerson and Barbara Torgerson. A plea agreement was submitted to the Trial Court. The Torgersons pled guilty to Counts One and Two and pursuant to the plea agreement, upon The Torgersons completing other portions of the plea agreements, the remaining Counts were to be dismissed.

On March 13, 1991, the Torgersons were sentenced.

On March 25, 1991, an appeal was filed with the Fifth Circuit Court of Appeals.

During the process of the appeal there were numerous motions and orders entered by the Fifth Circuit Court of Appeals, with the net result that Charles D. Butts was allowed to withdraw as attorney of record for the Torgersons upon their request.

On May 22, 1992, an opinion was issued by the United States Court of Appeals for the Fifth Circuit in effect denying all grounds that the Torgersons presented to the Court on appeal with the exception of ineffective assistance of counsel claims which the Appellate Court commented on that they could not address them without prejudicing an appellant's right to raise the issue in a Title 28 U.S.C. Section 2255 habeas motion.

On September 24, 1992, a motion was filed by the United States Government for an order enforcing the plea agreement or, in the alternative, to show cause why said plea agreement should not be enforced.

On October 5, 1992, Title 28 U.S.C. Section 2255 habeas motions were filed by Vernon D. Torgerson and Barbara H. Torgerson.

On November 10, 1992, the District Court Judge referred both motions for a hearing to Magistrate John W. Primomo.

On December 28, 1992, a response was filed by Vernon D. Torgerson and Barbara H. Torgerson to a motion by the United States Attorney's office for a hearing on its application for order enforcing plea agreement or, in the alternative, to show cause. (It should be noted that this response was originally filed on December 14, 1992, but was stricken by the Magistrate on December 16, 1992 for procedural errors with instructions to have said response filed with procedural corrections which was done).

On January 4, 1993, the Government's response to the 2255 Motion was filed.

On January 22, 1993, a reply by Barbara H. Torgerson and Vernon D. Torgerson in response to the Government's response to vacate under said 2255 Motion was filed.

On January 29, 1993, a report and recommendation of the Magistrate was filed denying the request for a hearing and issuing an order enforcing the plea agreement. At that same time the Magistrate referred the case back to the District Court.

On or about February 1, 1993, notification of the Magistrate's ruling was sent out to the undersigned and to Gus Wilcox, (Co-local counsel) Barbara H. Torgerson and Vernon D. Torgerson, requiring a time certain to file an appeal to the District Court.

On February 11, 1993, a motion was filed to extend the time to file the objections to the Magistrate's report which order was granted on February 12, 1993 by the District Court ordering that the response be filed no later than February 22, 1993.

On February 22, 1993, the objection to the report and recommendations on behalf of the Torgersons was filed in the District Court along with supplemental objections filed the same date.

On March 10, 1993, a response by the Government was filed.

On April 7, 1993, an order was entered by the District Court denying all requested relief by Mrs. Torgerson and, furthermore, denying them any hearing whatsoever under 28 U.S.C. 2255 and entering an order enforcing the plea agreement.

On April 27, 1993, appeals were filed on behalf of Vernon D. Torgerson and Barbara H. Torgerson to the Fifth Circuit Court of Appeals.

On January 10, 1994, an opinion was issued by the United States Court of Appeals for the Fifth Circuit affirming the District Court's decision denying the Torgersons a hearing on their 2255 Motion.

On February 4, 1994, a Petition for Panel Rehearing was filed by the Torgersons.

On February 22, 1994, the United States Court of Appeals for the Fifth Circuit denied the Petition for Panel Rehearing.

This Writ of Certiorari now follows.

THE DEFENDANTS, VERNON D. TORGERSON AND BARBARA H. TORGERSON, ARE CURRENTLY INCARCERATED.

B. STATEMENT OF FACTS

This entire case began when an Indictment was filed against Vernon Torgerson and Barbara Torgerson on October 19, 1990. Contained within the Appellant record in Volume I is a prior docketing statement, dated October 19, 1990, and since the majority of those issues were disposed of in the first appeal, and are not pertinent to this Writ request the undersigned is not detailing the Statement of Facts in this case until the proceedings began that have resulted in this Petition for Writ of Certiorari, i.e., September 24, 1992 (R1-30). However, to aid the Court in not having to go back through the entire record, going back to October, 1990, the undersigned has included the following extremely brief Statement of Facts for a general understanding of the case.

Vernon D. Torgerson and Barbara Torgerson were indicted on a multi-count Indictment of mail fraud (Title 18, Section 1341). There were plea negotiations entered into between The Torgersons' attorney, Charles Butts, and the United States Government that resulted in a guilty plea being entered by the Torgersons, a sentencing being issued by the Court, and an immediate appeal thereafter by Mr. Butts. Shortly after that appeal was filed, the Torgersons began making numerous allegations against Mr. Butts that are stated in detail here in the 2255 Petition itself (R1-36).

After an Appellate decision was issued by the Fifth Circuit concerning the Torgersons' original brief, the 2255 Petition was filed. It is very difficult to detail any other Statement of Facts since the 2255 was filed other than has already been listed in Subsection A immediately preceding herein because there has not been a hearing to allow the Torgersons to present further evidence. Furthermore, since there is no transcript because there was no hearing, there can be no references cited herein.

The allegations that the Torgersons are making that show why they should be given a hearing are addressed in the argument portion of this Writ.

REASONS FOR GRANTING THE WRIT

The leading Supreme Court case dealing with ineffective assistance of counsel claims is Strickland v. Washington, 466 U.S. 668, 80 L.Ed. 2d 674, 104 S.Ct. 2052, which holds as follows:

> (1) a convicted defendant alleging ineffective assistance of counsel must show not only that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonable effective assistance but also that counsel's errors were so serious as to deprive the defendant of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the results would have been different; and (2) reasonable probability of different results with effective assistance.

At the same time Strickland was decided, U. S. v. Cronic, 466 U. S. 648, 80 L.Ed. 2d 657, 104 S.Ct. 2039, was decided by the Supreme Court and said in part:

> ...the defendant could make out a Sixth Amendment claim of ineffective assistance of counsel only by pointing to specific errors by his counsel.

Since those two United States Supreme Court cases, there have been various interpretations and rulings throughout the circuits of the United States as to whether or not evidentiary hearings should be given in Title 28, Section 2255 Petitions.

> Marrow v. United States, 772 F.2d 525 (9th Cir. 1985) states: When a Petitioner alleges matters outside the record; e.g. a guilty plea coerced by threats from the F.B.I. against his girlfriend, the Defendant's attorney was informed of this but advised him to tell the Court that the plea was voluntary anyway, the District Court cannot dismiss the Petition without an evidentiary hearing.

The Torgersons allege numerous matters within the 2255 Petition that are outside of the record as it is currently contained and should be allowed the hearing to present evidence.

Marrow v. U.S. also addresses the totality of the circumstances question when it says:

To succeed on ineffective assistance of counsel claim, Petitioner must show that considering all the circumstances counsel's performance fell below objective standard of reasonableness, in that the is a reasonable probability that, but for counsel's unprofessional errors, result of the proceedings would have been different.

The Eleventh Circuit Court of Appeals addressed this issue in the case of Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) when it says:

Evidentiary hearing in habeas case is not required unless petitioner alleges facts which, if proven, would entitled him to habeas relief.

Furthermore, Porter v. Wainwright states:

Habeas Petitioner's stated claim of ineffective assistance of counsel at first sentencing hearing and was, therefore, entitled to an evidentiary hearing on that issue, where he alleged that attorney's failure to present mitigating character evidence was not strategic decision to prevent opening door to state's presentation of evidence of petitioner's past criminal activity, and that, if tactical, it was not reasonable in view of their failure to investigate potential mitigating evidence (Page 931).

Within the body of Porter v. Wainwright, page 935, it states:

Porter argues that his original sentencing attorneys' failure to present mitigating character evidence was not a strategic decision. As evidence of this claim, Porter points out that one of the few questions asked of Porter at the first sentencing hearing concerned Porter's prior criminal activity. Thus, Porter contends, the state cannot validly argue that Porter's attorneys were trying to keep the door closed when, in fact, they themselves opened it. Moreover, Porter asserts that the decision not to present mitigating character evidence at the first sentencing hearing could not have been a reasonable tactical decision because his attorneys had breached their affirmative duty to investigate potential mitigating evidence. See Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983).

Porter goes on to say:

> Of course, if Porter's attorneys made a reasonable tactical decision not to present mitigating evidence, there can be no finding of ineffective assistance of counsel. Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983), cert. denied, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 371 (1984). Moreover, an attorney's decision not to investigate mitigating character evidence must not be evaluated with the benefit of hindsight but rather should be accorded a strong presumption of reasonableness. Strickland, 104 S.Ct. at 2065. Without the aid of an evidentiary hearing at any level on this issue, however, we are unable to conclude that Jacksons and Widmeyer adequately investigated potential mitigating evidence, nor can we conclude that their decision not to present mitigating evidence was tactical (Underlining added).

That is the exact situation that we have with the Torgersons because Mr. Butts did not present numerous character evidence when requested to by the Torgersons. Furthermore, the Torgersons allege that Mr. Butts was guilty of ineffective assistance of counsel if, for no other reason, at sentencing than to not accept the Court's offer of a continuance of sentencing to present mitigating evidence to the Judge referring to the "Miller letter". In fact in the Torgersons reply to the Government's response to Motion to Vacate, Set Aside or Correct Illegal Sentence (R2-49) at page 170 of said response (Exhibit 3, page 1) a letter was submitted to the District Court which in fact totally contradicted the entire "Miller letter" which according to the sentencing transcript had a substantial impact on the sentencing Judge. Therefore, if for no other reason, the Torgersons should be given an evidentiary hearing to further develop these sentencing issues. Porter v. Wainwright goes on to state:

> In the instant case, no court, state or federal, has held an evidentiary hearing on this issue. Because Porter alleged facts which, if proved, would entitle him to relief, and because the state did not hold an evidentiary hearing on this issue, the district court was required to hold an evidentiary hearing (Page 936).

The Second Circuit states in Hayden v. U.S., 814 F.2d 888 (2d Cir. 1987) as follows:

> A hearing to resolve disputed issues of fact is required on a petition for habeas corpus unless the record shows that petitioner is not entitled to relief. 28 U.S.C.A. Section 2255.

> A petitioner seeking a hearing on petition for habeas corpus must set forth specific facts which he is in a position to establish by competent evidence. 28 U.S.C.A. Section 2255.

The Fifth Circuit states in the case of Davis V. Butler, 825 F.2d 892 (5th Cir. 1991):

> Allegations by the defendant that he pleaded guilty because his attorney told him that he would be pardoned in three years were sufficient to require a hearing on whether such promise was made and whether it rendered defendant's guilty plea unknowingly and involuntarily.

It is not alleged that Mr. Butts promised the Torgersons that the Torgersons would be pardoned in three years, but Mr. Butts did make numerous representations according to the Torgersons that directly affected the Torgersons' decision to enter a guilty plea. These numerous representations have already been detailed in the 2255 Petition itself (R1-36), page 314-15, the response by the Torgersons in reply to the Government's response to Motion to Vacate, Set Aside or Correct Illegal Sentence (R1-49), pages 115-133, and again in the objections by the Defendant to the Magistrate's recommendations (R2-60).

The Eleventh Circuit stated in Atkins v. Singletary, 965 F.2d 952:

> Court of Appeals must accept as true factual assertions made by a habeas petitioner when determining whether an evidentiary hearing is required.

The Torgersons have stated in their 2255 Petition that "the conviction obtained by plea of guilty which was unlawfully induced was not made voluntarily or with understanding of the nature of the charge and consequences of the plea". The Torgersons have signed that statement under penalties of perjury. Therefore, that fact taken as true pursuant to Atkins gives cause to indicate that this plea was not taken voluntarily and was based upon representations by the Torgersons' attorney. Therefore, how can an evidentiary hearing be denied when the case law is very clear as set out in numerous cases and again in U. S. v. Magini, 973 F.2d 261 which states:

> Federal court in habeas proceeding must hold evidentiary hearing when petitioner alleges facts which, if true, would entitle her to relief.

> Evidentiary hearing is necessary on habeas corpus motion where colorable Sixth Amendment claim concerning right to counsel is presented, and where material facts are in dispute involving inconsistencies beyond record. 28 U.S.C.A. Section 2255; U.S.C.A. Const.Amend. 6.

In Futch v. Dugger, 874 F.2d 1483, the Court stated:

> Federal habeas corpus petitioner is entitled to evidentiary hearing if he alleges facts which, if proven, would entitled him to relief.

In Agan v. Dugger, 835 F.2d 1337, rehearing denied 840 F.2d 25, cert. denied 108 S.Ct. 2846, 487 U.S. 1205, 101 L.Ed. 2d 884, it was stated:

> Evidentiary hearing is necessry whenever habeas petition alleges facts that, if true, establish right to relief.

Further, it was held in Cuevas v. Lynaugh, 754 F.Supp. 1127 that:

> For federal evidentiary hearing to take place in habeas proceedings, petitioner must allege facts, which, if proved, would entitled him to relief.

The Ninth Circuit states in the case of Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988):

> Section 2255 requires that 'unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall...grant a prompt hearing..., determine the issues and make findings of fact and conclusions of law'. 28 U.S.C. Section 2255 (1982). When Section 2255 motions are based on alleged occurrences entirely outside the record, which if true would support relief, the Court must conduct a hearing on those allegations 'unless, viewing the Petition against the record, its allegations do not state a claim for relief or are so patently frivolous or false as to warrant summary dismissal'. See Baumann v. United States, 692 F.2d 595, 571 (9th Cir. 1982).

The case of Boxton v. Lynaugh, 879 F.2d 140 (5th Cir. 1989), rehearing denied, 884 F.2d 577, cert. denied, 110 S.Ct. 3295, 111 L.Ed.2d 803, states concerning whether or not a hearing should be granted:

> For purposes of determining where the State Court fact findings are entitled to presumption of correctness in federal habeas corpus proceeding does not necessarily require evidentiary hearing; fact finding based on the record can in some circumstances be adequate.

However, in keeping with the earlier cases cited we have matters alleged by the Torgersons that could only be decided on matters outside of the record and the case law is clear that an evidentiary hearing should be granted.

The case of U.S. v. Aiello, 900 F.2d 528 (2d Cir. 1990) stands for the principal that if you had the trial judge who was "intimately familiar" with both the original proceeding and the 2255 allegations that he in some cases could deny the 2255 Hearing because he was so "intimately familiar" with the situation. We do not have that here as you had one judge who is now on the Fifth Circuit Court of Appeals who handled the matter at the trial court and then a second judge hearing the 2255 Motion who had absolutely nothing to do with the case when it was originally disposed of.

> The Fourth Circuit in Belton v. Barnett, 920 F.2d 1190, (1990) states: Where material facts are in dispute, federal court in habeas proceedings must hold evidentiary hearing, unless the facts were resolved in prior state hearing.

We do not have any prior state hearings here and in fact the Torgersons have been denied any hearing.

The Fifth Circuit again addresses this issue in U.S. v. Smith, 915 F.2d 959, Texas, 1990, which states:

> ...if evidence beyond record is necessary hearing must be held.

Therefore, the key question then becomes, does the 2255 Petition of the Torgersons allege matters outside the record which, if so, should grant him an evidentiary hearing or is the 2255 Petition "so patently frivolous or false as to warrant summary dismissal".

In answering this question one has to look further. In the case of Tollett v. Henderson, 411 U.S. 258, 266, 1973, the Supreme Court held that a guilty plea for foreclosure attack on antecedent constitutional violations when it states:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the evidence he received from counsel was not within the range of competence demanded of attorneys in criminal cases.

Although the Torgersons continue to state as one of their grounds in the Petition that the facts of their offense do not fit into the mail fraud statute and, therefore, their guilty plea should be set aside, since that issue has already been raised in their initial appeal, without sufficient supporting documentation or cases cited to the Fifth Circuit in the original appeal, this issue can only be addressed in the manner of was it ineffective assistance of counsel to not have raised the appropriate motions to dismiss the indictment on the ground that the facts did not fit the appropriate charge? Therefore, this issue becomes immediately, was the Torgersons trial attorney guilty of ineffective assistance of counsel?

The Fifth Circuit once again visits this issue in May v. Collins, 955 F.2d 299 (5th Cir., 1992) when it states:

> Review of claim that state habeas court denied petitioner full and fair hearing by failing to conduct evidentiary proceeding was debatable among jurists of reason and thus the Court of Appeals granted petitioner certificate of probable cause to appeal even though district court denied certificate.
>
> Habeas petitioner succeeds in showing fundamental miscarriage of justice, and thus can obtain federal review of claim defaulted in first round of habeas without showing cause and prejudice when he makes colorable showing of factual innocence; if petitioner makes showing, Court of Appeals has authority to consider merits of both abusive claims that fail cause and prejudice requirement as well as claims that may have been litigated and determined in prior petition.

Terrovona v. Kincheloe, 852 F.2d 424, appeal after remand 912 F.2d 1176, certiorari denied 111 S.Ct. 1631 states:

> An evidentiary hearing is mandatory in habeas proceeding if petitioner's allegations, if proved, would establish right to relief, and state court trier of fact has not, after full and fair hearing, reliably found relevant facts.

Norris v. Risley, 878 F.2d 1178, appeal after remand 918 F.2d 828 states:

> Habeas corpus petitioner is entitled to evidentiary hearing if he has alleged facts which, if proven, would entitle him to relief and he did not receive full and fair evidentiary hearing in state court.

Further, Ellis v. Lynaugh, 873 F.2d 830, certiorari denied 110 S.Ct. 419, 107 L.Ed. 2d 384 states:

> To receive federal evidentiary hearing, burden is on habeas corpus petitioner to allege facts which, if proved, would entitle him to relief; court need not blindly accept speculative and inconcrete claims as basis upon which to order hearing, and hearing is not required when record is complete or if petitioner raised only legal claims that can be resolved without the taking of additional evidence.

Harris v. Vasquez, 901 F.2d 724, application to vacate denied 110 S.Ct. 1799, 108 L.Ed. 2d 781 states:

> In proceedings under statute which provides for habeas application by a person in custody pursuant to a judgment of a state court, an evidentiary hearing is required when the petitioner's allegations, if proved, would establish the right to relief, and the State court trier of fact has not, after a full and fair hearing reliably found the relevant facts.

Also, Lesko v. Lehman, 925 F.2d 1527, rehearing denied states:

> When habeas petitioner raises material disputed facts which, if true, would entitle petitioner to relief, district court must hold evidentiary hearing if petitioner did not receive full and fair evidentiary hearing in state court, either at the time of trial or in collateral proceeding.

Zettlemoyer v. Fulcomer, 923 F.2d 284, rehearing denied states: District court must hold hearing if habeas corpus petitioner has alleged facts which would entitle him or her relief if proven and if an evidentiary hearing is necessary to establish the truth of those allegations...

By denying the Torgersons an evidentiary hearing on the issues presented in their 2255 Petition, it is a direct violation of the Torgersons' Fifth and Sixth Amendments rights to the constitution. The Torgersons have stated under oath in their 2255 Petition that they would not have pleaded guilty had it not been for the misrepresentations made to them by their attorney at the time of the guilty plea. The entire analysis throughout this proceeding of the Magistrate, the United States District Judge and the Fifth Circuit Court of Appeals is simply wrong.

CONCLUSION

All lower courts in this case have been attempting to come up with rationale to not grant the Torgersons a hearing on their 2255 Motion. There is no question that "in order to satisfy the prejudice requirement, the Defendant must show that there is a reasonable probability that, but for counsel's errors he would not have plead guilty and he would have insisted upon going to trial". Hill v. Lockhart, 474 U.S. 52, 58 (1985). The Torgersons have alleged that had it not been for the ineffective assistance of counsel for the reasons they have stated, they simply would not have plead guilty. How is that a "conclusory assertion" as cited in this Fifth Circuit's opinion and how does that not satisfy the Strickland v. Washington, 466 U.S. 668 (1984) and the Hill v. Lockhart, Supra, test? Apparently, the Courts are requiring the Appellants to completely prove their case in pleadings which is directly contrary to the basic instructions in the Federal Rules of Criminal Procedure, Appendix of Forms, when it calls for a model form for motions under 28 United States Code, Section 2255 when it states under subparagraph 2:

> (2) Additional pages are not permitted except with respect to the facts (italics in actual rule) which you rely upon to support your grounds for relief. No citation of authorities need be furnished...

And further under paragraph 12:

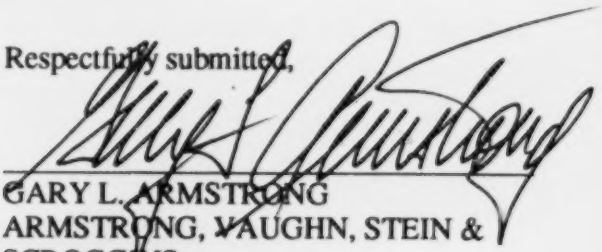
> State concisely (italics) every ground on which you claim that you are being held unlawfully. Summarize briefly (italics) the facts supporting each ground.

Furthermore, to prove a 2255 Petition in its pleadings is directly contrary to case law as stated above.

The Torgersons have complied with the procedural rules and are clearly entitled to a hearing as supported by case law in this Petition. The Torgersons are entitled to call witnesses and present evidence to conclusively prove their ineffective assistance of counsel claim which has already had its facts "summarized briefly". If the Torgersons cannot prove this, then there is a clear record of what was done and the Torgersons' constitutional rights would not be violated. However, as it stands the Torgersons' Fifth and Sixth Amendment rights are being violated.

The Torgersons would simply request that this Court grant this Writ of Certiorari, and allow briefs to be submitted to protect these Petitioners' Fifth and Sixth Amendment Constitutional rights. This Writ should not even be necessary, but the appellate courts are hiding behind the language in Strickland and are as a practical matter abusing Strickland to refuse hearings not only in this case but throughout the United States. This practice must stop. However, refusing hearings are obviously not going to stop unless there are new clearer guidelines established by the Supreme Court. If any person reading this Writ says, "I thought Strickland was reasonably clear", the undersigned would agree. However, since this hearing was unjustly denied, it is apparent the appellate system needs further instructions.

Respectfully submitted,



GARY L. ARMSTRONG
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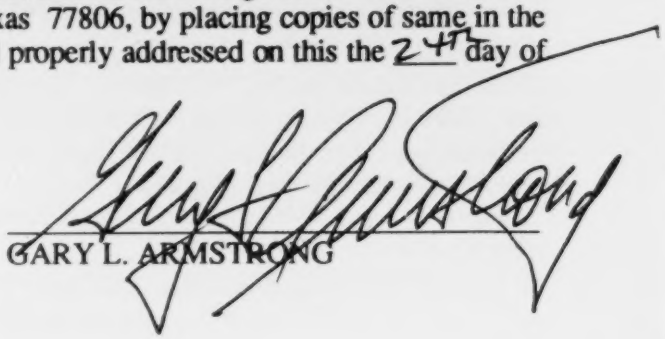
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Solicitor General, Department of Justice, Washington, D. C. 20530, Richard L. Durbin, Jr., Esquire, Assistant United States Attorney, Chief Appellate Section, United States Attorney's Office, 727 E. Durango Boulevard, A-601, San Antonio, Texas 78206-1199, Vernon D. Torgerson, F.C.I., P. O. Box 9300-S, Texarkana, Texas 75505, and Barbara Torgerson, 43933080, P. O. Box 2149, Brazos 2, Bryan, Texas 77806, by placing copies of same in the United States Mail, postage and properly addressed on this the 24th day of May, 1994.



GARY L. ARMSTRONG

APPENDIX A

FILED
JAN 29 1993
CHARLES W. VAGNER, Clerk
By /i/ TT Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

VERNON TORGERSON,	*	
	*	
Petitioner,	*	
	*	
V.	*	CAUSE NO. SA-92-CA-1048
	*	[SA-90-CR-293(1)]
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

Petitioner Vernon Torgerson has filed this motion to vacate, set aside, or correct his sentence for two counts of mail fraud, pursuant to Title 28 U.S.C. Section 2255. As grounds for relief, petitioner argues that his guilty plea was involuntary and that his retained counsel rendered him ineffective assistance of counsel, in violation of petitioner's Sixth Amendment rights. The Government has filed a response to petitioner's motion, arguing that many of petitioner's claims are refuted by either the record in this cause or by the Fifth Circuit's express holdings made in the course of affirming petitioner's conviction and sentence on direct appeal. The Government has filed its own separate motion seeking to enforce that portion of petitioner's plea agreement under which he agreed to execute a deed to his family homestead as part of his plea bargain with the Government. The District Court has referred all pending post-sentence motions to the undersigned for findings and recommendation pursuant to Title 28 U.S.C. Section 636(b). For the reasons, set forth in detail below, it is recommended that petitioner's Section 2255 motion be denied and that the Government's motion to enforce petitioner's plea agreement be granted.

Statement of the Case

On October 19, 1990, a federal grand jury indicted petitioner Vernon Torgerson and his wife, Barbara, on thirteen counts of mail fraud, all arising out

the Torgersons' dealings with the Ford Motor Credit Company.[1] On January 14, 1991, both of the Torgersons pleaded guilty pursuant to a plea bargain with the Government in which they each (1) pleaded guilty to the first two counts of the indictment against them, (2) agreed to make restitution in the amount of $15,829.959.69, and (3) agreed to execute a warranty deed conveying to Ford Motor Credit Company the title to "approximately 5.58 acres of land and all buildings located at 513 FM 471, Castroville, Texas, with the value of said property to be applied against their restitution obligation," in exchange for the Government's promise to dismiss the remaining counts against them.[2] On March 13, 1991, the District Court sentenced petitioner to serve two, consecutive, five-year terms of imprisonment on the two counts to which he pleaded guilty, ordered him to make restitution in the amount set forth in the plea agreement, and directed petitioner to pay a one hundred dollar special assessment.[3]

Petitioner filed a direct appeal from his conviction and sentence. He alleged that his guilty plea was not knowingly and voluntarily entered, the evidence was insufficient to sustain his convictions, the District Court erred in relying upon certain letters at sentencing, and the District Court erred in imposing the maximum sentence. In an unpublished opinion dated May 22, 1992, the Fifth Circuit affirmed petitioner's conviction and sentence.[4]

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[1] See docket entry no. 1.

[2] The written plea agreement appears as docket entry no. 11 herein.

[3] See docket entry no. 15.

[4] See United States v. Torgerson, Cause No. 91-5591 (5th Cir. May 22, 1992). A copy of the Fifth Circuit's opinion affirming petitioner's conviction and sentence appears as docket entry no. 28 herein. Significantly, in the course of affirming petitioner's conviction and sentence, the Fifth Circuit specifically held that (1) petitioner's claims that his guilty plea was rendered involuntary by virtue of his mental and physical ailments were wholly without merit, (2) the evidence introduced at petitioner's guilty plea and rearraignment hearing was more than sufficient to support their convictions, (3) the indictment against petitioner was sufficient under federal law, (4) petitioner's guilty plea waived all non-jurisdictional defects in the proceedings before the District Court, (5) there was no merit to the petitioner's claims that the sentencing court improperly considered certain letters from the petitioner's victims in imposing sentence upon petitioner, (6) there was no merit to the petitioner's complaint that the sentencing court erred in imposing the maximum duration of incarceration available as a part of his sentence, and (7) it would not address petitioner's claims that he should have been permitted to withdraw his guilty plea and that his counsel rendered ineffective assistance.

On September 24, 1992, the Government filed a motion requesting that the Court direct petitioner's former counsel of record to deliver to the Government the deed executed by petitioner and his wife to the property described in the plea agreement in this cause.[5] On October 14, 1992, petitioner's new counsel filed both a response to the Government's motion and a separate motion asking that the court correct its Judgment and Commitment Order in petitioner's case to correctly reflect the dates of the offenses to which petitioner had pleaded guilty.[6]

On November 5, 1992, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to Section 2255.[7]

On November 9, 1992, the Government filed a motion requesting a hearing on its motion to compel delivery of the deed executed by petitioner and his spouse as a part of their plea agreement with the Government.[8] In an Order dated November 10, 1992, the District Court referred all pending motions to the undersigned for preparation of a Memorandum and Recommendation.[9] On December 28, 1992, petitioner and his spouse filed their response to the Government's motion requesting a hearing on its motion to compel delivery of the deed mentioned in petitioner's plea agreement.[10]

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[5] See docket entry no. 30.

[6] See docket entry nos. 33 and 34. In his response to the Government's motion to compel delivery of the deed, counsel for petitioner argued that he was then in the process of preparing a Section 2255 motion attacking petitioner's conviction and sentence and that the Court should hold in abeyance any ruling on the Government's motion to compel delivery of the deed until the merits of petitioner's Section 2255 motion could be decided.

[7] See docket entry no. 36.

[8] See docket entry no. 39.

[9] See docket entry no. 41.

[10] See docket entry no. 46. Significantly, neither petitioner nor his spouse cites any legal authority in support for their request that they be excused from complying with their plea agreement pending disposition of their Section 2255 motions.

On January 4, 1993, the Government filed its response to petitioner's motion to vacate.[11]

Analysis and Authorities

Because it is central to petitioner's claim that his guilty plea was involuntary, we will first address petitioner's allegations that his counsel rendered ineffective assistance.

Ineffective Assistance

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[12]

In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness."[13] In so doing, a convicted

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[11] See docket entry no. 48.

[12] 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[13] Strickland v. Washington, 466 U.S. at 687-88, 104 S.Ct. at 2064.

defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance.[14] The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects o hindsight.[15] It is strongly presumed that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[16]

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[17] "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[18] In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[19]

Because a convicted defendant must satisfy both prongs of the Strickland test, a failure to establish either deficient performance or prejudice under that test makes it unnecessary to examine the other prong.[20] Therefore, a failure to establish that counsel's performance fell below an objective standard of

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[14] See Strickland v. Washington, 466 U.S. at 687-91, 104 S.Ct. at 2064-66; United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990); and Crockett v. McCotter, 796 F.2d 787, 791 (5th Cir.) cert. denied, 479 U.S. 1021 (1986).

[15] See Burger v. Kemp, 483 U.S. 776, 789, 107 S.Ct. 3114, 3123, 97 L.Ed.2d 638 (1987); Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. at 2065.

[16] See Strickland v. Washington, 466 U.S. at 890, 104 S.Ct. at 2066.

[17] 466 U.S. at 691, 104 S.Ct. at 2066.

[18] 466 U.S. at 692, 104 S.Ct. at 2067.

[19] 466 U.S. at 694, 104 S.Ct. at 2068.

[20] Buxton v. Lynaugh, 879 F.2d 140, 142 (5th Cir. 1989), cert. denied, 497 U.S. 1032 (1990); Earvin v. Lynaugh, 860 F.2d 623, 627 (5th Cir. 1988, cert. denied, 489 U.S. 1091 (1989).

reasonableness avoids the need to consider the issue of prejudice.[21] It is also unnecessary to consider whether counsel's performance was deficient where there is an insufficient showing of prejudice.[22] Claims of Ineffective Assistance Re: Guilty Plea

In this case, petitioner alleges that his counsel rendered ineffective assistance in connection with his guilty plea by (1) failing to file a motion to dismiss the indictment against petitioner for failure to allege an offense, (2) misleading petitioner into pleading guilty based upon misrepresentations concerning the holding in an unspecified U.S. Supreme Court opinion, (3) failing to interview witnesses who allegedly worked for Ford Motor Credit Company [henceforth "FMCC"] to determine the amount of loss sustained by FMCC, (4) failing to review court files, including letters written to the Court, (5) failing to accept the sentencing court's offer of a continuance to prepare evidence opposing information contained in the letters, (6) failing to request the Court for competency and medical examinations of petitioner, (7) failing to file appropriate pretrial motions, including motions for examination of exculpatory evidence, (8) failing to obtain and discuss with petitioner the discovery obtained in the case, and (9) failing to discuss with petitioner's defense counsel's own, unspecified, health problems.

In an ineffective assistance claim based upon the performance of counsel in connection with a guilty plea, the defendant must carry the burden of proof and persuasion to establish that a reasonable probability exists that, but for counsel's alleged deficiencies, the defendant would not have pleaded guilty and would have insisted on going to trial.[23] In the absence of such a showing, a defendant fails to satisfy the prejudice prong of the Strickland test.

1. Failing to Move to Dismiss the Indictment

Petitioner's claim that his defense counsel improperly failed to challenge the indictment against petitioner fails to satisfy the Strickland test.

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[21] See United States v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990).

[22] See Smith v. Puckett, 907 F.2d 581, 584 (5th Cir. 1990).

[23] See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); United States v. Smith, 915 F.2d at 963; United States v. Smith, 844 F.2d 203, 208-09 (5th Cir. 1988); Czere v. Butler, 833 F.2d 59, 63 (5th Cir. 1987); Uresti v. Lynaugh, 821 F.2d 1133, 1140-41 (5th Cir. 1987), cert. denied, 484 U.S. 1071 (1988).

Petitioner has failed to allege with specificity any potentially viable grounds to support such a motion. Global allegations regarding a failure to file a motion will not support relief under Section 2255 unless a viable basis for such a motion can be shown. In this case, petitioner, represented by counsel, has wholly failed to allege with specificity any grounds that would have warranted dismissal of the indictment against him. Thus, petitioner has failed to allege any facts showing that the failure of his trial counsel to move for the dismissal of the indictment against petitioner caused the performance of said counsel to fall below an objective level of reasonableness.

Assuming arguendo that petitioner believes that his trial counsel should have presented to the District Court the same arguments regarding his indictment that petitioner raised in his direct appeal, petitioner's first allegation of ineffective assistance still fails. The Fifth Circuit specifically rejected petitioner's arguments challenging the validity of the indictment against him in the course of affirming petitioner's conviction and sentence.[24] Thus, petitioner has also failed to show that he was prejudiced by virtue of his trial counsel's failure to challenge the sufficiency of the indictment against petitioner.[25]

2. Alleged Misrepresentations Concerning Governing Case Law

Petitioner alleges globally that his guilty plea was induced by virtue of his trial counsel's alleged misrepresentations concerning a holding of the U.S. Supreme Court in an unspecified case. However, petitioner never explains exactly what Supreme Court opinion was discussed by his attorney or how that discussion convinced petitioner to plead guilty rather than proceed to trial.[26]

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[24] Because the same argument was raised and rejected on direct appeal, it cannot again be raised here. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1976).

[25] Petitioner also seems to allege in the reply to the government's response (docket no. 49) that there was insufficient evidence to prove mail fraud. The Court of Appeals' opinion specifically held that the factual basis for the guilty plea was sufficient to establish mail fraud and also found that this non-jurisdictional issue had been waived. Thus, this matter need not be reevaluated.

[26] It is not enough for petitioner to allege that his counsel's interpretation of a Supreme Court opinion was erroneous. Petitioner must establish exactly what that interpretation was, how that interpretation influenced his decision to plead guilty, and why that interpretation was so erroneous as to render the level of his counsel's performance below an objective standard of reasonableness. Petitioner has not done this.

Conclusory allegations of ineffective assistance, such as this, simply will not support a finding of a violation of a constitutional right. Despite the liberality with which courts construe pro se pleadings, mere conclusory allegations on a critical issue, such as ineffective assistance of counsel, are insufficient to raise a constitutional issue.[27] Thus, petitioner's second allegation of ineffective assistance in connection with his guilty plea will not support relief under Section 2255.

3. Failure to Interview FMCC Witnesses Re: Damages

Petitioner's third allegation of ineffective assistance regarding his guilty plea consists of a claim that his counsel should have interviewed certain FMCC employees to ascertain the amount of actual loss sustained by FMCC as a result of petitioner's criminal conduct. However, petitioner never explains how additional information as to the amount of loss occasioned by his criminal conduct would have impacted his decision to plead guilty. It is not enough for petitioner to allege that the amount of loss sustained by FMCC was less than that provided for in the restitution portion of petitioner's plea agreement with the Government. Petitioner must show a reasonable probability that, but for the alleged error by his counsel, he would not have pleaded guilty but, instead, would have insisted on proceeding to trial on all thirteen counts against him. This, petitioner has failed to do.

In order to establish that counsel was rendered ineffective by virtue of a failure to investigate the case against a defendant, a convicted defendant must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case.[28] In this case, petitioner argues only that, had his counsel engaged in a better investigation of the loss occasioned by petitioner's criminal conduct, counsel may have determined that a part or all of FMCC's loss caused by petitioner was covered by insurance policies. However, such an argument is irrelevant to the issue of petitioner's guilty and responsibility for restitution. Even if all of the loss sustained by FMCC as a result of petitioner's nefarious conduct was covered by FMCC's insurance carriers, petitioner would still have owed the entire amount of that loss -- but instead of the recipient of the restitution

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[27] See Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990); United States v. Woods, 870 F.2d 185, 288 n.3 (5th Cir. 1989). See also Ross v. Estelle, 694 F.2d 1008, 1011-12 & n.2 (5th Cir. 1983).

[28] United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989); Alexander v. McCotter, 775 F.2d 595, 603 (5th Cir. 1985).

award being FMCC, it would have been FMCC's insurance carriers. [29] The identity of the party to whom petitioner owed his restitution obligation bears no relationship to the issue of petitioner's guilt or the amount of the restitution award agreed to by petitioner in his plea agreement with the Government.

Petitioner correctly points out that if the FMCC was reimbursed by an insurance entity, then the Court may not award restitution in favor of the FMCC that includes payments for the amount the bank was reimbursed by this third party.[30] However, petitioner fails to understand that this fact does not prevent the sentencing court from awarding restitution in favor of the third party to the extent that third party reimbursed the petitioner's victim for the victim's loss. In such a situation, the restitution order need not be reversed or vacated, but only modified to reflect that a portion of the convicted criminal defendant's restitution obligation is owed to the third party, and not just to the victim.[31] Thus, even if an insurance entity paid petitioner's victim for a portion or all of the loss suffered by the petitioner's victim, that fact alone would not warrant reducing petitioner's restitution obligation, only modifying the award of restitution to clarify exactly to whom petitioner owed that obligation.

4. Failing to Review Letters

Petitioner argues that his counsel was ineffective by virtue of his failure to review certain letters sent by Miller Leasing Co. and FMCC to the sentencing court. However, petitioner never explains how this alleged failure, which occurred after petitioner had entered his guilty plea, could have possibly impacted upon petitioner's previous decision to plead guilty. Thus, petitioner can show no prejudice with regard to this alleged deficiency in his counsel's alleged performance as that alleged deficiency had no effect upon petitioner's prior decision to plead guilty. Whether this alleged deficiency in the performance of petitioner's counsel had an impact upon petitioner's sentence will be discussed below.

5. Failing to Accept the Offered Continuance of Sentencing

Petitioner's claim that his counsel should have accepted the continuance of petitioner's sentencing hearing offered by the District Court to respond

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[29] See 18 U.S.C. Section 3663(e)(1).

[30] See 18 U.S.C. Section 3663(e)(1).

[31] See United States v. Golomb, 811 F.2d 787, 792 (2nd Cir 1987).

to the letters also fails to provide a basis for a finding of ineffective assistance in connection with petitioner's guilty plea. That alleged defect in the performance of petitioner's counsel occurred long after petitioner chose to plead guilty and, therefore, could not possibly have affected petitioner's decision to plead guilty. Thus, petitioner can show no prejudice from that alleged defect insofar as his guilty plea is concerned.

6. Failing to Request Competency Examination for Petitioner

Petitioner alleges that his counsel was deficient in failing to request a mental and physical examination of petitioner prior to petitioner's entry of his guilty plea. However, as the Fifth Circuit noted in its opinion on direct appeal, petitioner has wholly failed to allege any facts establishing that he was unable to understand and fully participate in the decision to plead guilty.[32] During his rearraignment and guilty plea hearing, petitioner testified under oath that he did not then suffer, nor had he ever suffered, from any mental or physical impairment that could affect his ability to understand the nature of that proceeding.[33] Thus, the failure of petitioner's counsel to request what, in petitioner's own sworn testimony, would have been a wholly useless mental examination of petitioner did not cause the performance of said counsel to fall below an objective level of reasonableness and certainly did not prejudice petitioner.

7 and 8. Failing to File Pretrial Motions and Obtain Discovery

Petitioner alleges that his counsel failed to file pretrial motions. However, the only specific pretrial motions suggested or mentioned in petitioner's Section 2255 motion are a motion to dismiss the indictment against petitioner and a motion for discovery. As explained above, petitioner has failed to allege a specific defect in his indictment and the failure of petitioner's counsel to file a nebulous challenge to the sufficiency of the petitioner's indictment did not

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[32] The Fifth Circuit found that both appellants and their counsel conceded their mental competence to plead guilty. See United States v. Torgerson, No. 91-5591 (5th Cir. May 22, 1992), a copy of which appears as docket entry no. 28 herein.

[33] See Statement of Facts from petitioner's rearraignment and guilty plea hearing, held January 14, 1991, attached as Attachment D to the Government's Response to Petitioner's Motion to Vacate, filed January 4, 1993, docket entry no. 48, at p. 3.

render said counsel's performance defective. The Fifth Circuit expressly and specifically held the indictment in petitioner's case sufficient to allege the offenses for which petitioner was convicted.[34] Thus, petitioner can show no prejudice as a result of his counsel's failure to file a frivolous motion to quash the indictment against petitioner on unspecified grounds.

Likewise, petitioner's argument that his counsel should have moved for pretrial discovery of exculpatory evidence ignores the long-standing discovery practice in this Court, governed by the Court's standing discovery order, which eliminates the necessity for the filing of numerous pretrial discovery motions. A Standing Discovery Order was entered by the District Court, in this case, on November 13, 1990.[35] Petitioner has failed to allege with specificity exactly what additional evidence or defenses would have been disclosed had such pretrial motions been filed or additional discovery been obtained. Thus, petitioner has failed to establish that the failure to file such motions or obtain pretrial discovery was defective or caused him prejudice as that term is defined in Strickland.

9. Failing to Disclose Unspecified Health Problems

In what may be petitioner's most patently absurd ineffectiveness claim, petitioner argues that his counsel should have disclosed to petitioner that he [counsel] suffered from unspecified health problems. However, petitioner never gives this Court even a clue as to what those health problems could possibly have been or how the alleged failure of said counsel to disclose same could possibly have impacted upon petitioner's decision to plead guilty. Thus, petitioner's final ineffectiveness claim with regard to his guilty plea does not establish that petitioner was "prejudiced" by the alleged deficiency in his counsel's performance and does not warrant relief under Section 2255.

Claims of Ineffective Assistance Re: Sentencing

Petitioner argues that his counsel rendered ineffective assistance in connection with petitioner's sentencing by (1) failing to subpoena a named witness to testify as to the damages FMCC had suffered, (2) failing to call as witnesses at sentencing two persons whom had apparently been convicted in state court of conduct similar to that for which petitioner was convicted in federal court, (3) failing to report to the sentencing court the status of petitioner's bankruptcy proceedings, (4) failing to "address the issue of

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[34] See United States v. Torgerson, No. 91-5591 (5th Cir. May 22, 1992), a copy of which appears as docket entry no. 28 herein.

[35] See docket entry no. 7.

restitution in bankruptcy," (5) failing to have an accountant or other expert testify as to the actual payments made by petitioner and the worth of the items seized by FMCC, as those matters related to the amount of restitution ordered in the case, (6) failing to issue subpoenas to unspecified witnesses to establish that the amount of loss suffered by FMCC had been offset by insurance coverage, (7) failing to determine whether FMCC had collected an excess of the contract amount with petitioner from other sources, (8) failing to call as witnesses at petitioner's sentencing those persons who furnished the Court with letters attesting to the petitioner's good character, (9) failing to move the Court to correct the error in the Court's Judgment and Commitment Order stating that the offenses for which petitioner was convicted occurred as late as October, 1990, when the two counts to which petitioner pleaded guilty related to criminal actions undertaken in August and September, 1987, and (10) failing to file a motion to withdraw petitioner's guilty plea.

1. Failing to Call Witnesses as to FMCC's Damages

Petitioner alleges that his counsel should have called witnesses to testify in connection with petitioner's sentencing as to the exact amount of loss sustained by FMCC as a result of petitioner's pattern of criminal activities. However, evidence of such matters would have been irrelevant to any issue before the sentencing court. When petitioner executed his plea agreement with the Government, petitioner contractually agreed to make restitution in a specific amount. Therefore, evidence that FMCC's actual losses were either greater or less than the amount set forth in petitioner's plea agreement was irrelevant to the issues remaining before the sentencing court. As explained above, evidence that a third party insurer had reimbursed FMCC for a part or all of the losses FMCC sustained as a result of petitioner's conduct would not have altered the amount of restitution owed by petitioner, only the identity of the party to whom that obligation was owed.

2. Failing to Call Other Convicted Criminals as Witnesses

Petitioner argues that his counsel should have called as witnesses at his sentencing hearing two persons convicted in state court in Florida of also having bilked FMCC of money in a scheme which petitioner apparently suggests was similar to that engineered by petitioner and his wife. However, petitioner never explains how these two individuals could have provided any testimony that was relevant to the issues then before the sentencing court. As explained above, even assuming that these two witnesses could have testified that FMCC had been able in their case to get back some or all of the money those two individuals had defrauded from FMCC, petitioner contractually agreed to make restitution in a specific amount in his plea agreement with the Government. Thus, testimony as to the remedies available to FMCC to recover the funds defrauded from it by these other two individuals would have been wholly irrelevant to any issue before the sentencing court in petitioner's case. In short, there was no issue

before the sentencing court during petitioner's sentencing hearing as to the amount of restitution involved in his case. Petitioner's plea agreement set that amount.

3 and 4. Failing to Address Restitution & Bankruptcy Issues

Petitioner argues that his counsel should have reported to the sentencing court on the status of the petitioner's bankruptcy proceedings and addressed the issue of how petitioner's restitution award would be treated in petitioner's bankruptcy proceedings. Contrary to petitioner's assertion, the restitution order was not dischargeable in bankruptcy.[36] However, regardless of whether all or any portion of petitioner's restitution obligation set forth in petitioner's plea agreement would have been dischargeable in bankruptcy, information on that issue would have been wholly irrelevant to any issue before the sentencing court. Petitioner does not even begin to suggest how the issue of whether a restitution award is dischargeable in bankruptcy could possibly have affected the sentencing court's imposition of sentence in petitioner's case. The amount of restitution involved in petitioner's case had previously been set by petitioner's plea agreement. Likewise, petitioner has wholly failed to allege any facts showing how a report on the status of petitioner's bankruptcy proceeding would have impacted upon petitioner's sentence. Because the amount of restitution involved in petitioner's case had been set in petitioner's plea agreement, the primary issue before the sentencing court was the duration of any term of imprisonment to be imposed in petitioner's case. Thus, petitioner has failed to establish that he was prejudiced by these alleged deficiencies in his counsel's performance.

5, 6, and 7. Failing to Produce Evidence Re: FMCC's Amount of Loss

Petitioner argues that his counsel should have introduced evidence showing FMCC's actual losses after accounting for any equipment FMCC could have recorded, or did actually recover from third parties, once it discovered petitioner's fraudulent scheme. However, as explained at length above, the amount of restitution involved in petitioner's case was set out in petitioner's plea agreement and could not have been altered by the sentencing court absent a complete abrogation of that contractual document. The fact that FMCC may have been able to recover a portion or all of its loss from other parties could not alter petitioner's contractual restitution obligation. Thus, petitioner has failed to establish that evidence as to the amount of loss actually

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[36] Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

sentencing court.

8. Failing to Produce Witnesses Re: Good Character and to Challenge Miller and FMCC Letters

Petitioner argues that his counsel should have produced live witnesses who could testify as to matters already before the Court in the form of letters attesting to petitioner's purported good character.[37] However, the witnesses in question had already furnished the sentencing court with letters providing the information petitioner wished to elicit through live testimony and, therefore, petitioner can demonstrate no "prejudice" from his counsel's failure to offer such redundant evidence.

The issue concerning the Miller and FMCC letters was raised on direct appeal. The Court of Appeals found no indication that the sentencing court was influenced by incorrect information in the letters and also found that petitioner had not demonstrated that the sentencing court relied on those letters in assessing sentence. Although petitioner now presents a notarized letter from Don Farrington, a friend and employee of the Torgersons, as evidence that the Miller letter is untrue, this Court finds no contradictions. Again, petitioner has not shown what impact these letters had on the sentencing judge. As noted by the Court of Appeals "the Torgerson's plea agreement concedes that they defrauded FMCC of approximately $15.8 million, a sum that speaks loudly for their culpability." Therefore, the failure to accept the offer of a continuance to challenge the Miller letter did not prejudice petitioner.

9. Failing to Move to Correct the Date in the Judgment

Petitioner also argues that his counsel should have moved to correct the erroneous date included in petitioner's Judgment and Commitment Order. However, petitioner's current counsel filed just such a motion on October 10, 1992.[38] In an Order dated November 9, 1992, the District Court corrected the alleged clerical error in petitioner's Judgment and Commitment Order, thus mooting petitioner's claim in this regard.[39] The sentencing court noted that

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[37] Setting aside for the moment the issue of redundancy, it remains doubtful whether such letters could possibly have impacted upon petitioner's sentence in view of the sentencing court's specific references to the scope and duration of petitioner's criminal activities.

[38] See docket entry no. 33.

[39] See docket entry no. 38.

petitioner was being sentenced under prior law, not the Sentencing Reform Act; therefore, the error did not show petitioner was adversely affected in sentencing.[40] Thus, petitioner has shown no prejudice by virtue of his counsel's failure to file a motion to correct petitioner's Judgment and Commitment Order at an earlier date.

10. Failing to Move for Withdrawal of Guilty Plea

Petitioner also argues that his counsel should have filed a motion requesting leave to withdraw petitioner's guilty plea. However, petitioner never alleges any potentially viable grounds for such a motion.[41] Absent some explanation of what potentially viable grounds petitioner could have asserted as a basis for withdrawing his guilty plea, petitioner's final allegation of deficient performance by his counsel is insufficient to warrant relief under Section 2255. Under the circumstances of this case, petitioner's claim that his attorney should have filed such a motion does not rise to the level of establishing ineffective assistance by said counsel.

Therefore, none of petitioner's arguments and allegations concerning the performance of his counsel, either in connection with petitioner's guilty plea or sentencing, warrants a finding of ineffective assistance of counsel or relief under Section 2255.

Claim of Involuntary Guilty Plea

During his rearraignment and guilty plea hearing held January 14, 1991, petitioner testified under oath that (1) he had never suffered from any

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[40] See transcript of Sentencing hearing held March 13, 1991, docket no. 23, p. 33.

[41] A mere change of mind is insufficient to permit the withdrawal of a guilty plea before sentencing. United States v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990). Likewise, a claim of innocence, standing alone, does not justify withdrawal. United States v. Hurtado, 846 F.2d 995, 995 (5th Cir.), cert. denied, 488 U.S. 863 (1988). Rule 32(d) of the Federal Rules of Criminal Procedure, which authorizes the withdrawal of guilty pleas upon a showing by the defendant of "any fair and just reason", was not intended to allow a defendant to make a tactical decision to enter a plea, wait several seeks, and obtain a withdrawal if he believes that he made a bad choice. Id. Yet, that appears to be exactly what petitioner was attempting to do in this case.

mental or physical impairment that could affect his ability to understand that proceeding,[42] (2) the entire plea agreement in his case was correctly stated in open court by the Assistant U.S. Attorney,[43] (3) he understood and agreed with the Assistant U. S. Attorney's explanation of that agreement,[44] (4) he understood that he had the right to plead not guilty and to persist in that plea,[45] (5) he had sufficient time to discuss his case with his counsel and was satisfied with his counsel's representation of him,[46] (6) he had received a copy of the indictment, had reviewed the two counts to which he was pleading guilty, and discussed same with his counsel,[47] (7) he understood and had no questions regarding the counts in indictment against him to which he was pleading guilty, as read in open court by the Assistant U.S. Attorney,[48] (8) he understood that he had the right to a jury trial,[49] (9) he understood that he had the right to representation by counsel at all stages of the proceedings against him,[50] (10) he understood the presumption of innocence and the prosecution's burden of

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[42] See Statement of Facts from petitioner's rearraignment and guilty plea hearing, held January 14, 1991, attached as Attachment D to the Government's Response to Petitioner's Motion to Vacate, filed January 4, 1993, docket entry no. 48, at page 3.

[43] Id. at pp. 3-5.

[44] Id. at p. 5.

[45] Id. at p. 6.

[46] Id. at pp. 6-7.

[47] Id. at p. 7.

[48] Id. at pp. 7-12.

[49] Id. at p. 12.

[50] Id.

proof,[51] (11) he understood that at trial he would have the rights to confront and cross-examine adverse witnesses, to object to the prosecution's evidence, and to testify on his own behalf or refrain from doing so without any inference of guilt being drawn therefrom,[52] (12) he understood that if he pleaded guilty he would effectively waive the foregoing rights,[53] (13) he was pleading guilty because he was guilty and for no other reason,[54] (14) he understood the

maximum penalties he could face if he pleaded guilty,[55] (15) he was pleading guilty freely and voluntarily and with full knowledge of the consequences,[56] (16) no one had threatened, coerced, or forced him to plead guilty,[57] (17) no one had made any promises, other than his plea agreement, to induce his guilty plea,[58] (18) no one had made any prediction, prophesy, or promise to him regarding his actual sentence,[59] (19) he had discussed the issue of conflict of interest with his attorney and was satisfied that there was no such conflict,[60] and (20) he understood the nature of the charges and had no questions about, and agreed with the factual basis for his guilty plea, as explained in open court by the Assistant U. S. Attorney.[61]

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[51] Id. at pp. 12-13 and 25.

[52] Id. at p. 13.

[53] Id.

[54] Id. at p. 14.

[55] Id. at pp. 14-17, and 19.

[56] Id. at p. 17.

[57] Id. at p. 17.

[58] Id. at pp. 17-18.

[59] Id. at p. 18.

[60] Id. at pp. 20-22 and 26-29.

[61] Id. at pp. 22-25.

"Ordinarily, a defendant will not be heard to refute his testimony given under oath when pleading guilty."[62] "Solemn declarations in open court carry a strong presumption of verity."[63] The representations made by the defendant, his lawyer, and the prosecutor at a plea hearing, as well as the findings made by the trial judge accepting the plea, constitute a formidable barrier to any subsequent collateral attack.[64]

In the present case, petitioner's allegation that his guilty plea was entered unknowingly is completely refuted by his own testimony at his rearraignment. Petitioner presents the court with no factual allegations sufficient to raise an issue as to the voluntariness of his guilty plea. In fact, the representations made to the Court at petitioner's rearraignment and sentencing hearings belie petitioner's argument that he was inducted to plead guilty by virtue of his counsel's deficient performance. As explained above, petitioner has failed to establish that there was any deficiency in his counsel's performance relevant to his guilty plea that could possibly have prejudiced petitioner in connection with that plea.

After a thorough review of the record in this cause, it is clear that petitioner's guilty plea was made both voluntarily and knowingly. None of the alleged deficiencies in the performance of petitioner's counsel rose to the level of ineffective assistance of counsel as defined in Strickland. Therefore, petitioner's challenge to the voluntariness of his guilty plea does not warrant relief under Section 2255.

Need for an Evidentiary Hearing

When, as here, a movant for relief under Title 28 U.S.C. Section 2255 has presented claims that are either contrary to law or plainly refuted by the

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[62] United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985).

[63] Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977); United States v. Raetzsch, 781 F.2d 1149, 1151 (5th Cir. 1986); United States v. Patterson, 739 F.2d 191, 195 (5th Cir. 1984).

[64] See Blackledge v. Allison, 431 U.S. at 73-74, 97 S.Ct. at 1629; United States v. Smith, 844 F.2d 203, 208 (5th Cir. 1988); United States v. Raetzsch, 781 F.2d at 1151; United States v. Corbett, 742 F.2d 173, 178 n.11 (5th Cir. 1984); and United States v. Patterson, 739 F.2d at 195.

record, an evidentiary hearing is not necessary.[65] Accordingly, petitioner's claims in this case do not merit an evidentiary hearing.

Motion to Compel Compliance with Plea Agreement

The Government is entitled to enforcement of the terms and conditions contained in petitioner's plea agreement, including the provision under which petitioner and his spouse agreed to execute a deed to certain real property in favor of the Government. Petitioner has not advanced a single legal authority justifying petitioner's refusal to comply with this portion of his plea agreement.

Recommendation

It is the recommendation of the undersigned United States Magistrate Judge that (1) petitioner's motion to vacate, set aside, or correct his sentence pursuant to Title 28 U.S.C. Section 2255 be, in all respects, DENIED and (2) the Government's motion requesting an Order directing petitioner's former counsel to deliver the executed deed mentioned in petitioner's plea agreement by **GRANTED**.

Instructions for Service and
Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section 636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within ten (10) days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the Magistrate judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the District Court.[66] Additionally, any failure to file written objections to the

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[65] See United States v. Green, 882 F.2d 999, 1008 (5th Cir. 1989); United States v. Raetzsch, 781 F.2d 1149, 1151 (5th Cir. 1986); United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985); and Tittle v. United States, 407 F.2d 843, 844 (5th Cir. 1969).

[66] Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982). See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985).

proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted to adopted by the District Court, except upon grounds of plain error or manifest injustice.[67]

SIGNED this 29th day of January, 1993.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE

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[67] Nettles, 677 F.2d at 410.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JANUARY 29, 1993
CHARLES J. VAGNER, Clerk
By: TT Deputy

VERNON TORGERSON,	*	
	*	
Petitioner,	*	
	*	
VS.	*	CAUSE NO. SA-92-CA-1048
	*	[SA-90-CR-293(1)]
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

All matters for which this cause was referred to the Magistrate Judge having been considered and acted upon;

It is ORDERED that the above-entitled and numbered cause be, and it hereby is, RETURNED to the District Court for all Purposes.

SIGNED this 29th day of January, 1993.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX B

FILED
JAN 29 1993
CHARLES W. VAGNER, Clerk
By /i/ TT Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BARBARA TORGERSON,	*	
	*	
Petitioner,	*	
	*	
V.	*	CAUSE NO. SA-92-CA-1050
	*	[SA-90-CR-293(2)]
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

Petitioner Barbara Torgerson has filed this motion to vacate, set aside, or correct her sentence for two counts of mail fraud, pursuant to Title 28 U.S.C. Section 2255. As grounds for relief, petitioner argues that her guilty plea was involuntary and that her retained counsel rendered her ineffective assistance of counsel, in violation of petitioner's Sixth Amendment rights. The Government has filed a response to petitioner's motion, arguing that many of petitioner's claims are refuted by either the record in this cause or by the Fifth Circuit's express holdings made in the course of affirming petitioner's conviction and sentence on direct appeal. The Government has filed its own separate motion seeking to enforce that portion of petitioner's plea agreement under which she agreed to execute a deed to her family homestead as part of her plea bargain with the Government. The District Court has referred all pending post-sentence motions to the undersigned for findings and recommendation pursuant to Title 28 U.S.C. Section 636(b). For the reasons, set forth in detail below, it is recommended that petitioner's Section 2255 motion be denied and that the Government's motion to enforce petitioner's plea agreement be granted.

Statement of the Case

On October 19, 1990, a federal grand jury indicted petitioner Barbara Torgerson and her husbands, Vernon, on thirteen counts of mail fraud, all

arising out the Torgersons' dealings with the Ford Motor Credit Company.[1] On January 14, 1991, both of the Torgersons pleaded guilty pursuant to a plea bargain with the Government in which they each (1) pleaded guilty to the first two counts of the indictment against them, (2) agreed to make restitution in the amount of $15,829.959.69, and (3) agreed to execute a warranty deed conveying to Ford Motor Credit Company the title to "approximately 5.58 acres of land and all buildings located at 513 FM 471, Castroville, Texas, with the value of said property to be applied against their restitution obligation," in exchange for the Government's promise to dismiss the remaining counts against them.[2] On March 13, 1991, the District Court sentenced petitioner to serve two, consecutive, five-year terms of imprisonment on the two counts to which she pleaded guilty, ordered her to make restitution in the amount set forth in the plea agreement, and directed petitioner to pay a one hundred dollar special assessment.[3]

Petitioner filed a direct appeal from her conviction and sentence. She alleged that her guilty plea was not knowingly and voluntarily entered, the evidence was insufficient to sustain her convictions, the District Court erred in relying upon certain letters at sentencing, and the District Court erred in imposing the maximum sentence. In an unpublished opinion dated May 22, 1992, the Fifth Circuit affirmed petitioner's conviction and sentence.[4]

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[1] See docket entry no. 1.

[2] The written plea agreement appears as docket entry no. 11 herein.

[3] See docket entry no. 15.

[4] See United States v. Torgerson, Cause No. 91-5591 (5th Cir. May 22, 1992). A copy of the Fifth Circuit's opinion affirming petitioner's conviction and sentence appears as docket entry no. 28 herein. Significantly, in the course of affirming petitioner's conviction and sentence, the Fifth Circuit specifically held that (1) petitioner's claims that his guilty plea was rendered involuntary by virtue of his mental and physical ailments were wholly without merit, (2) the evidence introduced at petitioner's guilty plea and rearraignment hearing was more than sufficient to support their convictions, (3) the indictment against petitioner was sufficient under federal law, (4) petitioner's guilty plea waived all non-jurisdictional defects in the proceedings before the District Court, (5) there was no merit to the petitioner's claims that the sentencing court improperly considered certain letters from the petitioner's victims in imposing sentence upon petitioner, (6) there was no merit to the petitioner's complaint that the sentencing court erred in imposing the maximum duration of incarceration available as a part of his sentence, and (7) it would not address petitioner's claims that he should have been permitted to withdraw his guilty plea and that his counsel rendered ineffective assistance.

On September 24, 1992, the Government filed a motion requesting that the Court direct petitioner's former counsel of record to deliver to the Government the deed executed by petitioner and her husband to the property described in the plea agreement in this cause.[5] On October 14, 1992, petitioner's new counsel filed both a response to the Government's motion and a separate motion asking that the court correct its Judgment and Commitment Order in petitioner's case to correctly reflect the dates of the offenses to which petitioner had pleaded guilty.[6]

On November 5, 1992, petitioner filed a motion to vacate, set aside, or correct her sentence pursuant to Section 2255.[7]

On November 9, 1992, the Government filed a motion requesting a hearing on its motion to compel delivery of the deed executed by petitioner and her spouse as a part of their plea agreement with the Government.[8] In an Order dated November 10, 1992, the District Court referred all pending motions to the undersigned for preparation of a Memorandum and Recommendation.[9] On December 28, 1992, petitioner and her spouse filed their response to the Government's motion requesting a hearing on its motion to compel delivery of the deed mentioned in petitioner's plea agreement.[10]

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[5] See docket entry no. 30.

[6] See docket entry nos. 33 and 34. In his response to the Government's motion to compel delivery of the deed, counsel for petitioner argued that he was then in the process of preparing a Section 2255 motion attacking petitioner's conviction and sentence and that the Court should hold in abeyance any ruling on the Government's motion to compel delivery of the deed until the merits of petitioner's Section 2255 motion could be decided.

[7] See docket entry no. 36.

[8] See docket entry no. 39.

[9] See docket entry no. 41.

[10] See docket entry no. 46. Significantly, neither petitioner nor his spouse cites any legal authority in support for their request that they be excused from complying with their plea agreement pending disposition of their Section 2255 motions.

On January 4, 1993, the Government filed its response to petitioner's motion to vacate.[11]

Analysis and Authorities

Because it is central to petitioner's claim that her guilty plea was involuntary, we will first address petitioner's allegations that her counsel rendered ineffective assistance.

Ineffective Assistance

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in the case of Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[12]

In order to establish that her counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness."[13] In so doing, a convicted

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[11] See docket entry no. 48.

[12] 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

[13] Strickland v. Washington, 466 U.S. at 687-88, 104 S.Ct. at 2064.

defendant must carry the burden of proof and overcome a strong presumption that the conduct of her trial counsel falls within a wide range of reasonable professional assistance.[14] The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight.[15] It is strongly presumed that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[16]

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[17] "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[18] In order to establish that she has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[19]

Because a convicted defendant must satisfy both prongs of the Strickland test, a failure to establish either deficient performance or prejudice under that test makes it unnecessary to examine the other prong.[20] Therefore, a failure to establish that counsel's performance fell below an objective standard of

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[14] See Strickland v. Washington, 466 U.S. at 687-91, 104 S.Ct. at 2064-66; United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990); and Crockett v. McCotter, 796 F.2d 787, 791 (5th Cir.) cert. denied, 479 U.S. 1021 (1986).

[15] See Burger v. Kemp, 483 U.S. 776, 789, 107 S.Ct. 3114, 3123, 97 L.Ed.2d 638 (1987); Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. at 2065.

[16] See Strickland v. Washington, 466 U.S. at 890, 104 S.Ct. at 2066.

[17] 466 U.S. at 691, 104 S.Ct. at 2066.

[18] 466 U.S. at 692, 104 S.Ct. at 2067.

[19] 466 U.S. at 694, 104 S.Ct. at 2068.

[20] Buxton v. Lynaugh, 879 F.2d 140, 142 (5th Cir. 1989), cert. denied, 497 U.S. 1032 (1990); Earvin v. Lynaugh, 860 F.2d 623, 627 (5th Cir. 1988, cert. denied, 489 U.S. 1091 (1989).

reasonableness avoids the need to consider the issue of prejudice.[21] It is also unnecessary to consider whether counsel's performance was deficient where there is an insufficient showing of prejudice.[22] Claims of Ineffective Assistance Re: Guilty Plea

In this case, petitioner alleges that her counsel rendered ineffective assistance in connection with her guilty plea by (1) failing to file a motion to dismiss the indictment against petitioner for failure to allege an offense, (2) misleading petitioner into pleading guilty based upon misrepresentations concerning the holding in an unspecified U.S. Supreme Court opinion, (3) failing to interview witnesses who allegedly worked for Ford Motor Credit Company [henceforth "FMCC"] to determine the amount of loss sustained by FMCC, (4) failing to review court files, including letters written to the Court, (5) failing to accept the sentencing court's offer of a continuance to prepare evidence opposing information contained in the letters, (6) failing to request the Court for competency and medical examinations of petitioner, (7) failing to file appropriate pretrial motions, including motions for examination of exculpatory evidence, (8) failing to obtain and discuss with petitioner the discovery obtained in the case, and (9) failing to discuss with petitioner's defense counsel's own, unspecified, health problems.

In an ineffective assistance claim based upon the performance of counsel in connection with a guilty plea, the defendant must carry the burden of proof and persuasion to establish that a reasonable probability exists that, but for counsel's alleged deficiencies, the defendant would not have pleaded guilty and would have insisted on going to trial.[23] In the absence of such a showing, a defendant fails to satisfy the prejudice prong of the Strickland test.

1. Failing to Move to Dismiss the Indictment

Petitioner's claim that her defense counsel improperly failed to challenge the indictment against petitioner fails to satisfy the Strickland test.

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[21] See United States v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990).

[22] See Smith v. Puckett, 907 F.2d 581, 584 (5th Cir. 1990).

[23] See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); United States v. Smith, 915 F.2d at 963; United States v. Smith, 844 F.2d 203, 208-09 (5th Cir. 1988); Czere v. Butler, 833 F.2d 59, 63 (5th Cir. 1987); Uresti v. Lynaugh, 821 F.2d 1133, 1140-41 (5th Cir. 1987), cert. denied, 484 U.S. 1071 (1988).

Petitioner has failed to allege with specificity any potentially viable grounds to support such a motion. Global allegations regarding a failure to file a motion will not support relief under Section 2255 unless a viable basis for such a motion can be shown. In this case, petitioner, represented by counsel, has wholly failed to allege with specificity any grounds that would have warranted dismissal of the indictment against her. Thus, petitioner has failed to allege any facts showing that the failure of her trial counsel to move for the dismissal of the indictment against petitioner caused the performance of said counsel to fall below an objective level of reasonableness.

Assuming arguendo that petitioner believes that her trial counsel should have presented to the District Court the same arguments regarding her indictment that petitioner raised in her direct appeal, petitioner's first allegation of ineffective assistance still fails. The Fifth Circuit specifically rejected petitioner's arguments challenging the validity of the indictment against her in the course of affirming petitioner's conviction and sentence.[24] Thus, petitioner has also failed to show that she was prejudiced by virtue of her trial counsel's failure to challenge the sufficiency of the indictment against petitioner.[25]

2. Alleged Misrepresentations Concerning Governing Case Law

Petitioner alleges globally that her guilty plea was induced by virtue of her trial counsel's alleged misrepresentations concerning a holding of the U.S. Supreme Court in an unspecified case. However, petitioner never explains exactly what Supreme Court opinion was discussed by her attorney or how that discussion convinced petitioner to plead guilty rather than proceed to trial.[26]

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[24] Because the same argument was raised and rejected on direct appeal, it cannot again be raised here. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1976).

[25] Petitioner also seems to allege in the reply to the government's response (docket no. 49) that there was insufficient evidence to prove mail fraud. The Court of Appeals' opinion specifically held that the factual basis for the guilty plea was sufficient to establish mail fraud and also found that this non-jurisdictional issue had been waived. Thus, this matter need not be reevaluated.

[26] It is not enough for petitioner to allege that his counsel's interpretation of a Supreme Court opinion was erroneous. Petitioner must establish exactly what that interpretation was, how that interpretation influenced his decision to plead guilty, and why that interpretation was so erroneous as to render the level of his counsel's performance below an objective standard of reasonableness. Petitioner has not done this.

Conclusory allegations of ineffective assistance, such as this, simply will not support a finding of a violation of a constitutional right. Despite the liberality with which courts construe pro se pleadings, mere conclusory allegations on a critical issue, such as ineffective assistance of counsel, are insufficient to raise a constitutional issue.[27] Thus, petitioner's second allegation of ineffective assistance in connection with her guilty plea will not support relief under Section 2255.

3. Failure to Interview FMCC Witnesses Re: Damages

Petitioner's third allegation of ineffective assistance regarding her guilty plea consists of a claim that her counsel should have interviewed certain FMCC employees to ascertain the amount of actual loss sustained by FMCC as a result of petitioner's criminal conduct. However, petitioner never explains how additional information as to the amount of loss occasioned by her criminal conduct would have impacted her decision to plead guilty. It is not enough for petitioner to allege that the amount of loss sustained by FMCC was less than that provided for in the restitution portion of petitioner's plea agreement with the Government. Petitioner must show a reasonable probability that, but for the alleged error by his counsel, she would not have pleaded guilty but, instead, would have insisted on proceeding to trial on all thirteen counts against her. This, petitioner has failed to do.

In order to establish that counsel was rendered ineffective by virtue of a failure to investigate the case against a defendant, a convicted defendant must do more than merely allege a failure to investigate; she must state with specificity what the investigation would have revealed and how it would have altered the outcome of the case.[28] In this case, petitioner argues only that, had her counsel engaged in a better investigation of the loss occasioned by petitioner's criminal conduct, counsel may have determined that a part or all of FMCC's loss caused by petitioner was covered by insurance policies. However, such an argument is irrelevant to the issue of petitioner's guilty and responsibility for restitution. Even if all of the loss sustained by FMCC as a result of petitioner's nefarious conduct was covered by FMCC's insurance carriers, petitioner would still have owed the entire amount of that loss -- but instead of the recipient of the restitution award being FMCC, it would have been

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[27] See Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990); United States v. Woods, 870 F.2d 185, 288 n.3 (5th Cir. 1989). See also Ross v. Estelle, 694 F.2d 1008, 1011-12 & n.2 (5th Cir. 1983).

[28] United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989); Alexander v. McCotter, 775 F.2d 595, 603 (5th Cir. 1985).

FMCC's insurance carriers. [29] The identity of the party to whom petitioner owed her restitution obligation bears no relationship to the issue of petitioner's guilt or the amount of the restitution award agreed to by petitioner in her plea agreement with the Government.

Petitioner correctly points out that if the FMCC was reimbursed by an insurance entity, then the Court may not award restitution in favor of the FMCC that includes payments for the amount the bank was reimbursed by this third party.[30] However, petitioner fails to understand that this fact does not prevent the sentencing court from awarding restitution in favor of the third party to the extent that third party reimbursed the petitioner's victim for the victim's loss. In such a situation, the restitution order need not be reversed or vacated, but only modified to reflect that a portion of the convicted criminal defendant's restitution obligation is owed to the third party, and not just to the victim.[31] Thus, even if an insurance entity paid petitioner's victim for a portion or all of the loss suffered by the petitioner's victim, that fact alone would not warrant reducing petitioner's restitution obligation, only modifying the award of restitution to clarify exactly to whom petitioner owed that obligation.

4. Failing to Review Letters

Petitioner argues that her counsel was ineffective by virtue of her failure to review certain letters sent by Miller Leasing Co. and FMCC to the sentencing court. However, petitioner never explains how this alleged failure, which occurred after petitioner had entered her guilty plea, could have possibly impacted upon petitioner's previous decision to plead guilty. Thus, petitioner can show no prejudice with regard to this alleged deficiency in her counsel's alleged performance as that alleged deficiency had no effect upon petitioner's prior decision to plead guilty. Whether this alleged deficiency in the performance of petitioner's counsel had an impact upon petitioner's sentence will be discussed below.

5. Failing to Accept the Offered Continuance of Sentencing

Petitioner's claim that her counsel should have accepted the continuance of petitioner's sentencing hearing offered by the District Court to respond

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[29] See 18 U.S.C. Section 3663(e)(1).

[30] See 18 U.S.C. Section 3663(e)(1).

[31] See United States v. Golomb, 811 F.2d 787, 792 (2nd Cir 1987).

to the letters also fails to provide a basis for a finding of ineffective assistance in connection with petitioner's guilty plea. That alleged defect in the performance of petitioner's counsel occurred long after petitioner chose to plead guilty and, therefore, could not possibly have affected petitioner's decision to plead guilty. Thus, petitioner can show no prejudice from that alleged defect insofar as her guilty plea is concerned.

6. Failing to Request Competency Examination for Petitioner

Petitioner alleges that her counsel was deficient in failing to request a mental and physical examination of petitioner prior to petitioner's entry of her guilty plea. However, as the Fifth Circuit noted in its opinion on direct appeal, petitioner has wholly failed to allege any facts establishing that she was unable to understand and fully participate in the decision to plead guilty.[32] Duringer rearraignment and guilty plea hearing, petitioner testified under oath that she did not then suffer, nor had she ever suffered, from any mental or physical impairment that could affect her ability to understand the nature of that proceeding.[33] Thus, the failure of petitioner's counsel to request what, in petitioner's own sworn testimony, would have been a wholly useless mental examination of petitioner did not cause the performance of said counsel to fall below an objective level of reasonableness and certainly did not prejudice petitioner.

7 and 8. Failing to File Pretrial Motions and Obtain Discovery

Petitioner alleges that her counsel failed to file pretrial motions. However, the only specific pretrial motions suggested or mentioned in petitioner's Section 2255 motion are a motion to dismiss the indictment against petitioner and a motion for discovery. As explained above, petitioner has failed to allege a specific defect in her indictment and the failure of petitioner's counsel to file a nebulous challenge to the sufficiency of the petitioner's indictment did not

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[32] The Fifth Circuit found that both appellants and their counsel conceded their mental competence to plead guilty. See United States v. Torgerson, No. 91-5591 (5th Cir. May 22, 1992), a copy of which appears as docket entry no. 28 herein.

[33] See Statement of Facts from petitioner's rearraignment and guilty plea hearing, held January 14, 1991, attached as Attachment D to the Government's Response to Petitioner's Motion to Vacate, filed January 4, 1993, docket entry no. 48, at p. 3.

render said counsel's performance defective. The Fifth Circuit expressly and specifically held the indictment in petitioner's case sufficient to allege the offenses for which petitioner was convicted.[34] Thus, petitioner can show no prejudice as a result of her counsel's failure to file a frivolous motion to quash the indictment against petitioner on unspecified grounds.

Likewise, petitioner's argument that her counsel should have moved for pretrial discovery of exculpatory evidence ignores the long-standing discovery practice in this Court, governed by the Court's standing discovery order, which eliminates the necessity for the filing of numerous pretrial discovery motions. A Standing Discovery Order was entered by the District Court, in this case, on November 13, 1990.[35] Thus, petitioner can show no prejudice as a result of her counsel's failure to file a frivolous motion to quash the indictment against Petitioner on unspecified grounds.

Likewise, petitioner's argument that her counsel should have moved for pretrial discovery of exculpatory evidence ignores the long-standing discovery practice in this Court, governed by the Court's standing discovery order, which eliminates the necessity for the filing of numerous pretrial discovery motions. A Standing Discovery Order was entered by the District Court, in this case, on November 13, 1990.[36] Petitioner has failed to allege with specificity exactly what additional evidence or defenses would have been disclosed had such pretrial motions been filed or additional discovery been obtained. Thus, petitioner has failed to establish that the failure to file such motions or obtain pretrial discovery was defective or caused him prejudice as that term is defined in Strickland.

9. Failing to Disclose Unspecified Health Problems

In what may be petitioner's most patently absurd ineffectiveness claim, petitioner argues that her counsel should have disclosed to petitioner that he suffered from unspecified health problems. However, petitioner never gives this Court even a clue as to what those health problems could possibly have been or how the alleged failure of said counsel to disclose same could possibly have

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[34] See United States v. Torgerson, No. 91-5591 (5th Cir. May 22, 1992), a copy of which appears as docket entry no. 28 herein.

[35] See docket entry no. 7.

[36] See docket entry no. 7.

impacted upon petitioner's decision to plead guilty. Thus, petitioner's final ineffectiveness claim with regard to her guilty plea does not establish that petitioner was "prejudiced" by the alleged deficiency in his counsel's performance and does not warrant relief under Section 2255.

10. Failing to Advise Re: Nature of the Charges and Consequences of a Guilty Plea

In the final claim of ineffective assistance in connection with her guilty plea, petitioner alleges that her counsel failed to advise her of the nature of the charges against her and failed to advise her of the consequences of her guilty pleas. However, during her rearraignment and guilty plea hearing held January 14, 1991, petitioner testified under oath that (1) she had sufficient time to discuss the case with her counsel and was satisfied with his representation of her,[37] (2) she had received a copy of the indictment against her, had reviewed same, and discussed it with her counsel,[38] (3) she understood and had no questions about the charges to which she was pleading guilty, as read in open court by the Assistant U.S. Attorney,[39] and (4) she understood the maximum penalties she could receive if she persisted in her guilty plea.[40] She did not dispute her counsel's representation that he met with her at least 12 times.[41] Her claim that her counsel failed to consult with and advise her is clearly meritless.

Despite the District Court's admonitions and instructions, petitioner persisted in her guilty pleas to the first two counts of the indictment against her. As will appear below, her sworn testimony establishes that, at the time she entered her guilty pleas, she was fully aware of the nature of the charges against her and the consequences of her guilty pleas to those charges. Thus, petitioner cannot demonstrate that the alleged failure of her counsel to advise her of the same information the District Court took such pains to advise her of caused her "prejudice" within the meaning of that term under Strickland. Therefore, petitioner's naked claim that she was not informed by her counsel of the very

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[37] See Statement of Facts from petitioner's rearraignment and guilty plea hearing, held January 14, 1991, attached as Attachment D to the Government's Response to Petitioner's Motion to Vacate, filed January 4, 1993, docket entry no. 47, at p. 35.

[38] Id. at pp. 35-36.

[39] Id. at pp. 36-40.

[40] Id. at pp. 46-48.matters she was advised of by the Court prior to the entry of her guilty plea will not support a finding of ineffective assistance and does not warrant relief under Section 2255.

[41] Id. at p. 31.

Claims of Ineffective Assistance Re: Sentencing

Petitioner argues that her counsel rendered ineffective assistance in connection with petitioner's sentencing by (1) failing to subpoena two physicians as to her medical condition and a named witness to testify as to the damages FMCC had suffered, (2) failing to call as witnesses at sentencing two persons whom had apparently been convicted in state court of conduct similar to that for which petitioner was convicted in federal court, (3) failing to report to the sentencing court the status of petitioner's bankruptcy proceedings, (4) failing to "address the issue of restitution in bankruptcy," (5) failing to have an accountant or other expert testify as to the actual payments made by petitioner and the worth of the items seized by FMCC, as those matters related to the amount of restitution ordered in the case, (6) failing to issue subpoenas to unspecified witnesses to establish that the amount of loss suffered by FMCC had been offset by insurance coverage, (7) failing to determine whether FMCC had collected an excess of the contract amount with petitioner from other sources, (8) failing to call as witnesses at petitioner's sentencing those persons who furnished the Court with letters attesting to the petitioner's good character, (9) failing to move the Court to correct the error in the Court's Judgment and Commitment Order stating that the offenses for which petitioner was convicted occurred as late as October, 1990, when the two counts to which petitioner pleaded guilty related to criminal actions undertaken in August and September, 1987, and (10) failing to file a motion to withdraw petitioner's guilty plea.

1. Failing to Call Witnesses as to FMCC's Damages and Petitioner's Medical Condition

Petitioner alleges that her counsel should have called witnesses to testify in connection with petitioner's sentencing as to the exact amount of loss sustained by FMCC as a result of petitioner's pattern of criminal activities. However, evidence of such matters would have been irrelevant to any issue before the sentencing court. When petitioner executed her plea agreement with the Government, petitioner contractually agreed to make restitution in a specific amount. Therefore, evidence that FMCC's actual losses were either greater or less than the amount set forth in petitioner's plea agreement was irrelevant to the issues remaining before the sentencing court. As explained above, evidence that a third party insurer had reimbursed FMCC for a part or all of the losses FMCC sustained as a result of petitioner's conduct would not have altered the amount of restitution owed by petitioner, only the identity of the party to whom that obligation was owed.

As noted above, the medical evidence now offered does not indicate that petitioner was incompetent. While it did reflect on her medical condition and the effect incarceration would have, the record reflects that this issue was brought to the Court's attention in both the Presentence Investigation Report

and defense counsel's allocution at sentencing.[42] In its opinion, the Court of Appeals found no error in the imposition of the maximum sentence in petitioner's case. Petitioner can show no prejudice from counsel's failure to produce the medical evidence, now submitted, at the time of sentencing.

2. Failing to Call Other Convicted Criminals as Witnesses

Petitioner argues that her counsel should have called as witnesses at her sentencing hearing two persons convicted in state court in Florida of also having bilked FMCC of money in a scheme which petitioner apparently suggests was similar to that engineered by petitioner and her husband. However, petitioner never explains how these two individuals could have provided any testimony that was relevant to the issues then before the sentencing court. As explained above, even assuming that these two witnesses could have testified that FMCC had been able in their case to get back some or all of the money those two individuals had defrauded from FMCC, petitioner contractually agreed to make restitution in a specific amount in her plea agreement with the Government. Thus, testimony as to the remedies available to FMCC to recover the funds defrauded from it by these other two individuals would have been wholly irrelevant to any issue before the sentencing court in petitioner's case. In short, there was no issue before the sentencing court during petitioner's sentencing hearing as to the amount of restitution involved in her case. Petitioner's plea agreement set that amount.

3 and 4. Failing to Address Restitution & Bankruptcy Issues

Petitioner argues that her counsel should have reported to the sentencing court on the status of the petitioner's bankruptcy proceedings and addressed the issue of how petitioner's restitution award would be treated in petitioner's bankruptcy proceedings. Contrary to petitioner's assertion, the restitution order was not dischargeable in bankruptcy.[43] However, regardless of whether all or any portion of petitioner's restitution obligation set forth in petitioner's plea agreement would have been dischargeable in bankruptcy, information on that issue would have been wholly irrelevant to any issue before the sentencing court. Petitioner does not even begin to suggest how the issue of whether a restitution award is dischargeable in bankruptcy could possibly have affected

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[42] See transcript of Sentencing hearing held March 13, 1991, docket no. 23, pp. 28-31.

[43] Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

the sentencing court's imposition of sentence in petitioner's case. The amount of restitution involved in petitioner's case had previously been set by petitioner's plea agreement. Likewise, petitioner has wholly failed to allege any facts showing how a report on the status of petitioner's bankruptcy proceeding would have impacted upon petitioner's sentence. Because the amount of restitution involved in petitioner's case had been set in petitioner's plea agreement, the primary issue before the sentencing court was the duration of any term of imprisonment to be imposed in petitioner's case. Thus, petitioner has failed to establish that she was prejudiced by these alleged deficiencies in her counsel's performance.

5, 6, and 7. Failing to Produce Evidence Re: FMCC's Amount of Loss

Petitioner argues that her counsel should have introduced evidence showing FMCC's actual losses after accounting for any equipment FMCC could have recorded, or did actually recover from third parties, once it discovered petitioner's fraudulent scheme. However, as explained at length above, the amount of restitution involved in petitioner's case was set out in petitioner's plea agreement and could not have been altered by the sentencing court absent a complete abrogation of that contractual document. The fact that FMCC may have been able to recover a portion or all of its loss from other parties could not alter petitioner's contractual restitution obligation. Thus, petitioner has failed to establish that evidence as to the amount of loss actually incurred by FMCC would have had any relevance to the issues before the sentencing court.

8. Failing to Produce Witnesses Re: Good Character and to Challenge Miller and FMCC Letters

Petitioner argues that her counsel should have produced live witnesses who could testify as to matters already before the Court in the form of letters attesting to petitioner's purported good character.[44] However, the witnesses in question had already furnished the sentencing court with letters providing the information petitioner wished to elicit through live testimony and, therefore, petitioner can demonstrate no "prejudice" from her counsel's failure to offer such redundant evidence.

The issue concerning the Miller and FMCC letters was raised on direct

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[44] Setting aside for the moment the issue of redundancy, it remains doubtful whether such letters could possibly have impacted upon petitioner's sentence in view of the sentencing court's specific references to the scope and duration of petitioner's criminal activities.

appeal. The Court of Appeals found no indication that the sentencing court was influenced by incorrect information in the letters and also found that petitioner had not demonstrated that the sentencing court relied on those letters in assessing sentence. Although petitioner now presents a notarized letter from Don Farrington, a friend and employee of the Torgersons, as evidence that the Miller letter is untrue, this Court finds no contradictions. Again, petitioner has not shown what impact these letters had on the sentencing judge. As noted by the Court of Appeals "the Torgerson's plea agreement concedes that they defrauded FMCC of approximately $15.8 million, a sum that speaks loudly for their culpability." Therefore, the failure to accept the offer of a continuance to challenge the Miller letter did not prejudice petitioner.

9. Failing to Move to Correct the Date in the Judgment

Petitioner also argues that her counsel should have moved to correct the erroneous date included in petitioner's Judgment and Commitment Order. However, petitioner's current counsel filed just such a motion on October 10, 1992.[45] In an Order dated November 9, 1992, the District Court corrected the alleged clerical error in petitioner's Judgment and Commitment Order, thus mooting petitioner's claim in this regard.[46] The sentencing court noted that petitioner was being sentenced under prior law, not the Sentencing Reform Act; therefore, the error did not show petitioner was adversely affected in sentencing.[47] Thus, petitioner has shown no prejudice by virtue of her counsel's failure to file a motion to correct petitioner's Judgment and Commitment Order at an earlier date.

10. Failing to Move for Withdrawal of Guilty Plea

Petitioner also argues that her counsel should have filed a motion requesting leave to withdraw petitioner's guilty plea. However, petitioner never

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[45] See docket entry no. 33.

[46] See docket entry no. 38.

[47] See transcript of Sentencing hearing held March 13, 1991, docket no. 23, p. 33.

alleges any potentially viable grounds for such a motion.[48] Absent some explanation of what potentially viable grounds petitioner could have asserted as a basis for withdrawing her guilty plea, petitioner's final allegation of deficient performance by her counsel is insufficient to warrant relief under Section 2255. Under the circumstances of this case, petitioner's claim that her attorney should have filed such a motion does not rise to the level of establishing ineffective assistance by said counsel.

Therefore, none of petitioner's arguments and allegations concerning the performance of her counsel, either in connection with petitioner's guilty plea or sentencing, warrants a finding of ineffective assistance of counsel or relief under Section 2255.

Claim of Involuntary Guilty Plea

During her rearraignment and guilty plea hearing held January 14, 1991, petitioner testified under oath that (1) she had never suffered from any mental or physical impairment that could affect her ability to understand that proceeding,[49] (2) the entire plea agreement in her case was correctly stated in open court by the Assistant U.S. Attorney,[50] (3) she understood and agreed with the Assistant U. S. Attorney's explanation of that agreement,[51] (4) she understood that she had the right to plead not guilty and to persist in that plea,[52] (5)

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[48] A mere change of mind is insufficient to permit the withdrawal of a guilty plea before sentencing. United States v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990). Likewise, a claim of innocence, standing alone, does not justify withdrawal. United States v. Hurtado, 846 F.2d 995, 995 (5th Cir.), cert. denied, 488 U.S. 863 (1988). Rule 32(d) of the Federal Rules of Criminal Procedure, which authorizes the withdrawal of guilty pleas upon a showing by the defendant of "any fair and just reason", was not intended to allow a defendant to make a tactical decision to enter a plea, wait several seeks, and obtain a withdrawal if he believes that he made a bad choice. Id. Yet, that appears to be exactly what petitioner was attempting to do in this case.

[49] See Statement of Facts from petitioner's rearraignment and guilty plea hearing, held January 14, 1991, attached as Attachment D to the Government's Response to Petitioner's Motion to Vacate, filed January 4, 1993, docket entry no. 48, at page 3.

[50] Id. at pp. 3-5.

[51] Id. at p. 5.

[52] Id. at p. 6.

she had sufficient time to discuss her case with her counsel and was satisfied with her counsel's representation of her,[53] (6) she had received a copy of the indictment, had reviewed the two counts to which she was pleading guilty, and discussed same with her counsel,[54] (7) she understood and had no questions regarding the counts in indictment against her to which he was pleading guilty, as read in open court by the Assistant U.S. Attorney,[55] (8) she understood that she had the right to a jury trial,[56] (9) she understood that she had the right to representation by counsel at all stages of the proceedings against her,[57] (10) she understood the presumption of innocence and the prosecution's burden of proof,[58] (11) she understood that at trial she would have the rights to confront and cross-examine adverse witnesses, to object to the prosecution's evidence, and to testify on her own behalf or refrain from doing so without any inference of guilt being drawn therefrom,[59] (12) she understood that if she pleaded guilty he would effectively waive the foregoing rights,[60] (13) she was pleading guilty because she was guilty and for no other reason,[61] (14) she understood the maximum penalties she could face if she pleaded guilty,[62] (15) she was pleading guilty freely and voluntarily and with full knowledge of the consequences,[63] (16) no one had threatened, coerced, or forced her to plead guilty,[64] (17) no one

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[53] Id. at pp. 6-7.

[54] Id. at p. 7.

[55] Id. at pp. 7-12.

[56] Id. at p. 12.

[57] Id.

[58] Id. at pp. 12-13 and 25.

[59] Id. at p. 13.

[60] Id.

[61] Id. at p. 14.

[62] Id. at pp. 14-17, and 19.

[63] Id. at p. 17.

[64] Id. at p. 17.

had made any promises, other than her plea agreement, to induce her guilty plea,[65] (18) no one had made any prediction, prophesy, or promise to her regarding her actual sentence,[66] (19) she had discussed the issue of conflict of interest with her attorney and was satisfied that there was no such conflict,[67] and (20) she understood the nature of the charges and had no questions about, and agreed with the factual basis for her guilty plea, as explained in open court by the Assistant U. S. Attorney.[68]

"Ordinarily, a defendant will not be heard to refute his testimony given under oath when pleading guilty."[69] "Solemn declarations in open court carry a strong presumption of verity."[70] The representations made by the defendant, her lawyer, and the prosecutor at a plea hearing, as well as the findings made by the trial judge accepting the plea, constitute a formidable barrier to any subsequent collateral attack.[71]

In the present case, petitioner's allegation that her guilty plea was entered unknowingly is completely refuted by her own testimony at her rearraignment. Petitioner presents the court with no factual allegations sufficient to raise an issue as to the voluntariness of her guilty plea. In fact, the representations made to the Court at petitioner's rearraignment and sentencing hearings belie petitioner's argument that she was inducted to plead guilty by virtue of her counsel's deficient performance. As explained above, petitioner has failed to establish that there was any deficiency in her counsel's performance relevant to her guilty plea that could possibly have prejudiced petitioner in connection with that plea.

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[65] Id. at pp. 17-18.

[66] Id. at p. 18.

[67] Id. at pp. 20-22 and 26-29.

[68] Id. at pp. 22-25.

[69] United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985).

[70] Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977); United States v. Raetzsch, 781 F.2d 1149, 1151 (5th Cir. 1986); United States v. Patterson, 739 F.2d 191, 195 (5th Cir. 1984).

[71] See Blackledge v. Allison, 431 U.S. at 73-74, 97 S.Ct. at 1629; United States v. Smith, 844 F.2d 203, 208 (5th Cir. 1988); United States v. Raetzsch, 781 F.2d at 1151; United States v. Corbett, 742 F.2d 173, 178 n.11 (5th Cir. 1984); and United States v. Patterson, 739 F.2d at 195.

After a thorough review of the record in this cause, it is clear that petitioner's guilty plea was made both voluntarily and knowingly. None of the alleged deficiencies in the performance of petitioner's counsel rose to the level of ineffective assistance of counsel as defined in Strickland. Therefore, petitioner's challenge to the voluntariness of her guilty plea does not warrant relief under Section 2255.

Need for an Evidentiary Hearing

When, as here, a movant for relief under Title 28 U.S.C. Section 2255 has presented claims that are either contrary to law or plainly refuted by the record, an evidentiary hearing is not necessary.[72] Accordingly, petitioner's claims in this case do not merit an evidentiary hearing.

Motion to Compel Compliance with Plea Agreement

The Government is entitled to enforcement of the terms and conditions contained in petitioner's plea agreement, including the provision under which petitioner and her spouse agreed to execute a deed to certain real property in favor of the Government. Petitioner has not advanced a single legal authority justifying petitioner's refusal to comply with this portion of her plea agreement.

Recommendation

It is the recommendation of the undersigned United States Magistrate Judge that (1) petitioner's motion to vacate, set aside, or correct her sentence pursuant to Title 28 U.S.C. Section 2255 be, in all respects, DENIED and (2) the Government's motion requesting an Order directing petitioner's former counsel to deliver the executed deed mentioned in petitioner's plea agreement by **GRANTED**.

Instructions for Service and
Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28 U.S.C. Section

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[72] See United States v. Green, 882 F.2d 999, 1008 (5th Cir. 1989); United States v. Raetzsch, 781 F.2d 1149, 1151 (5th Cir. 1986); United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985); and Tittle v. United States, 407 F.2d 843, 844 (5th Cir. 1969).

636(b)(1), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within ten (10) days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the Magistrate judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the District Court.[73] Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted to adopted by the District Court, except upon grounds of plain error or manifest injustice.[74]

SIGNED this 29th day of January, 1993.

/s/ John W. Primomo
JOHN W. PRIMOMO
UNITED STATES MAGISTRATE JUDGE

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[73] Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982). See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985).

[74] Nettles, 677 F.2d at 410.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JANUARY 29, 1993
CHARLES J. VAGNER, Clerk
By: TT Deputy

BARBARA TORGERSON,	*	
	*	
Petitioner,	*	
	*	
VS.	*	CAUSE NO. SA-92-CA-1050
	*	[SA-90-CR-293(2)]
UNITED STATES OF AMERICA,	*	
	*	
Respondent.	*	

ORDER

All matters for which this cause was referred to the Magistrate Judge having been considered and acted upon;

It is ORDERED that the above-entitled and numbered cause be, and it hereby is, RETURNED to the District Court for all Purposes.

SIGNED this 29th day of January, 1993.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
APRIL 7, 1993
CHARLES W. VAGNER, Clerk
By /i/ TT Deputy

VERNON TORGERSON AND BARBARA TORGERSON,	*	
Petitioners,	*	
VS.	*	CAUSE NOS. SA-92-CA-1050
	*	SA-92-CA-1048
UNITED STATES OF AMERICA,	*	[SA-90-CR-293(1)&(2)
Respondent.	*	

ORDER

Vernon and Barbara Torgerson were indicted on thirteen counts of mail fraud arising out of their dealings with the Ford Motor Credit Company. On January 14, 1991, the Torgersons pled guilty pursuant to a plea bargain with the Government. The Torgersons agreed to plead guilty to Counts I and II of the indictment against them; agreed to make restitution in the amount of $15,829,959.69; and agreed to execute a warranty deed to Ford Motor Credit Company conveying title to approximately 5.58 acres of land and all buildings located at 513 FM 471, Castroville, Texas, with the value of said property to be applied against their restitution obligation. In return, the Government agreed to dismiss the remaining counts against them. The sentence was subsequently appealed and affirmed.

On this date came on for consideration by the Court petitioner Vernon and Barbara Torgerson's respective motions to vacate, set aside or correct sentence filed pursuant to Title 28 U.S.C. Section 2255. The Government has also filed a separate motion seeking to enforce that portion of petitioner's plea agreement under which they agreed to execute a deed to their family homestead as part of the plea bargain with the Government. The Government indicates that it stands ready to dismiss the remaining counts of the indictment once the deed is delivered.

The Court has reviewed the motions, the responses, and the pertinent pleadings. The Court has also fully considered the January 29, 1993 Memorandum and Recommendations of the United States Magistrate Judge John W.

Primomo, defendants' objections and supplemental objections thereto, the Government's response to petitioners' objections, as well as the entire record.

The Magistrate Judge found that petitioners' ineffective assistance of counsel claim in conjunction with petitioner's respective guilty pleas and sentencings did not warrant relief under Section 2255; that petitioners' guilty pleas were entered knowingly and voluntarily; and that the Government was entitled to enforce that provision of petitioners' plea agreement whereby the petitioners agreed to execute a deed to certain real property in favor of the Government.

Petitioners generally object to the Magistrate Judge's conclusion that ineffective assistance of counsel did not affect the voluntary nature of the Torgersons' guilty pleas. Petitioners also contend that their medical evidence indicates that Mrs. Torgerson may have lost touch with reality and contend that a hearing is necessary to examine why counsel did not submit available medical reports to the Court.

In the direct appeal, the Fifth Circuit noted, "[w]e have carefully reviewed the transcript of the guilty plea proceeding and conclude that the court thoroughly and completely evaluated the appellants' capacity to plead guilty and their understanding of the charges against them." See Fifth Circuit Ruling, p. 2, filed July 14, 1992. The Fifth Circuit also found that both appellants and their counsel conceded the Torgersons' mental competence to plead guilty. Id. As the Magistrate Judge indicated, petitioners' own sworn testimony rendered the need for a mental examination useless and cannot serve as a basis for ineffective assistance of counsel.

Petitioners also specifically object to counsel's failure to move for dismissal of the indictment. Yet, the Fifth Circuit held that the indictment and the factual recitation of the Assistant U.S. Attorney was sufficient to establish a claim of federal mail fraud. See Fifth Circuit Ruling, p. 2, filed July 14, 1992. Therefore, counsel was not ineffective in declining to pursue dismissal of the valid indictment. Arguing that only the general principle was raised in the appellate court without citation to specific authority, petitioners speculate that it is highly unlikely that the Fifth Circuit made any effort to look for case law to support the Torgersons' position. This Court finds that the holding of an appellate court on direct appeal should not be litigated again.

Petitioners next allege that counsel induced their guilty pleas by discussing a nonexistent Supreme Court case with them. The Court finds petitioners' objections meritless in this regard. The Court also finds that the Magistrate Judge correctly analyzed the issues with respect to interviewing witnesses, filing pre-trial motions, reviewing letters, failing to accept a continuance of the sentencing and failing to disclose counsel's health problems.

Petitioners generally object to all of the Magistrate's conclusions dealing with sentencing issues and specifically objects to: 1) counsel's failure to call other convicted criminals as witnesses, and 2) failure to move for withdrawal of the guilty plea. Petitioners now allude to a "sympathy factor" which the Court could have taken into account on their behalf. Yet, petitioner's Section 2255 motion actually alleged that the witnesses could have resulted in a "substantially reduced" restitution order. See Motion to Vacate, Para. 12(B)(b).

The Magistrate Judge thoroughly explained that because petitioners contractually agreed to make restitution in a specific amount in the plea agreement, testimony relating to the amount of restitution would have been wholly irrelevant to any issue before the sentencing court. This Court finds that petitioners' rather vague reference to a "sympathy factor" does not change the conclusions reached by Magistrate Judge Primomo in this regard. This Court also finds that the Magistrate Judge properly analyzed petitioners' withdrawal of guilty plea allegation.

The Torgersons have also filed a supplemental objection dealing with the motion to compel compliance with the plea agreement. Petitioners indicate that the trial judge violated Rule 11 of the Federal Rules of Civil Procedure by rejecting the plea agreement with the Government and by failing to allow withdrawal of the guilty pleas. Petitioners contend that Judge Garza flatly rejected that portion of the written plea agreement requiring petitioners to sign over their homestead in exchange for the government dropping all remaining counts.

Petitioners allege that the sentencing transcript shows a reluctance by trial court Judge Garza to sanction that portion of the plea agreement or to involve himself with the property deed portion of the plea agreement. The Government argues that the transcript shows that petitioner Vernon Torgerson had already been sentenced in accordance with the plea agreement before the question of executing the deed arose.

The Government notes that it was attempting to have the plea agreement enforced by having petitioner execute the deed. When the trial court, in effect, threatened to allow the petitioner to withdraw his plea and go to trial, the Government asked to reserve dismissing the remainder of the counts pending execution and delivery of the deed. The Government observes that the trial court allowed this arrangement and it was made part of the judgment and commitment order.

This Court finds that the trial Court actually gave petitioner Vernon Torgerson the opportunity to withdraw the plea and go to trial:

THE COURT: Okay. Mr. Torgeson (sic), you may sign the deed if you want, and if you don't want, you don't have to sign the deed. And Mr. Jahn, if you want to, if that's not in compliance with the plea agreement, we'll just go to trial.

MR. JAHN: (Government) Okay.

THE COURT: All right. You all decide. Either sign it or not.

MR. JAHN: It needs to be signed in front of a notary, Your Honor. So, if we could, we will reserve dismissing the remainder of the counts until it's executed.

THE COURT: Fine.

MR. JAHN: We'll file a separate motion to dismiss based upon that, Your Honor.

THE COURT: Fine. I'm not going to get involved in what the value is of this particular piece of property.

MR. JAHN: We're willing to accept the value, Your Honor. It's just a question of whether or not it's an environmental damage. If there's any hidden defect in the property, it would cost Ford more than the value of the property. That's all that they're concerned with. That's all they want to do, just send somebody out there to walk over the property, and see if there's any barrels or leaking acid, or anything like that.

MR. BUTTS: (Def. atty) Your Honor, we'll resolve that matter. That's--

THE COURT: I think you all ought to resolve that matter.

MR. BUTTS: --not a matter for the Court to be concerned about.

See Sentencing Transcript, p. 24-25. This Court finds that the trial court primarily did not want to involve himself in valuation of the property. Indeed, the April 11, 1991 judgment and commitment order reflects that the district court intended that the Government dismiss the remaining counts of the indictment upon "full compliance" with the plea agreement. See Judgment and Commitment Order, p. 2. After a full review of the record, this Court concludes that the trial court did not reject the plea agreement.

The Court has conducted an independent review of the entire record in this cause and a de novo review with respect to the objections as required by Title 28 U.S.C. Section 636(b)(1)(C). The Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions as contained in his January 29, 1993 Memorandums.

The Court agrees with the Magistrate Judge's Recommendation that petitioners' respective motions to vacate, set aside, or correct sentence should be in all things denied; and that the Government's motion requesting an order directing petitioner's former counsel to deliver the executed deed referenced in petitioners' plea agreement should be granted.

Accordingly, the Court hereby DENIES petitioners' respective motions to vacate, set aside, or correct sentence in all respects. The Court also hereby GRANTS the Government's motion requesting an order directing delivery of the executed deed referenced in petitioners' plea agreement.

IT IS FURTHER ORDERED that Vernon and Barbara Torgerson shall deliver to the Ford Motor Credit Corporation the warranty deed executed by them to convey to the Ford Motor Credit Corporation title to approximately 5.58 acres of land and buildings located in Castroville, Texas.

SIGNED this 7th day of April, 1993.

/s/ H. F. GARCIA
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

U.S. COURT OF APPEALS
FILED
JAN 10 1994

CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8280
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON D. TORGERSON

Defendant-Appellant.

****

No. 93-8281
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARBARA TORGERSON

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(SA-90-CR-293(1) & SA-92-CA-1050

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM: [1]

Vernon and Barbara Torgerson appeal from the denial of their 28 U.S.C. Section 2255 motions to vacate, set aside, or correct their sentences, imposed following their pleas of guilty to two counts of mail fraud. We AFFIRM.

I.

Our court affirmed the Torgersons' convictions and sentences, but did not consider their claims that their retained trial counsel, Charles Butts, rendered ineffective assistance, because the district court had not had an opportunity to develop the record on those claims. United States v. Torgerson, Nos. 91-5591 & 91-5592 (5th Cir. 1992) (unpublished). The Torgersons filed Section 2255 motions, raising 20 grounds for the claim that Butts rendered ineffective assistance of counsel.

The magistrate judge recommended that the motion be denied. The Torgersons filed written objections to the recommendation, contending that they were entitled to an evidentiary hearing. Without conducting a hearing, the district court adopted the recommendation.

II.

The Torgersons contend that the district court erred by denying their Section 2255 motion without an evidentiary hearing. We review the denial of an evidentiary hearing only for an abuse of discretion. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992).

> The question whether an evidentiary hearing is necessary to resolve charges of ineffective assistance depends on an assessment of the record. If the district court cannot resolve the allegations without examining evidence beyond the record, it must hold a hearing. If the record is clearly adequate to dispose fairly of the allegations, the court need inquire no further. A hearing is also unnecessary when the petitioner's allegations are inconsistent with his conduct and when he does not offer detailed and specific facts surrounding his allegations.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990) (internal quotation marks and citations omitted).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established the well known two-part standard for ineffective assistance claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at 687. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome". Id. at 694.

"[T]he two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel". Hill v. Lockhart, 474 U.S. 52, 58 (1985). "[I]n order to satisfy the `prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, eh would not have pleaded guilty and would have insisted on going to trial". Id at 59.

The Torgersons' briefs contain little more than conclusory assertions that they were entitled to an evidentiary hearing, and at most touch on just six of the 20 grounds for ineffective assistance set forth in their Section 2255 motions. Of course, issues not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985). Accordingly, we consider only the six grounds mentioned in the briefs; some of those lack legal support or analysis.

A.

The Torgersons contend that Butts was ineffective for failing to file a motion to dismiss the indictments on the ground that the facts of their offenses do not constitute mail fraud. Our court held on direct appeal that the indictment was sufficient. Accordingly, the Torgersons have not demonstrated prejudice. The record is adequate to dispose of this ground; therefore, an evidentiary hearing was not necessary.

B.

The Torgersons assert that Butts made "numerous representations" that directly affected their decisions to plead guilty. However, they did not

identify them in their briefs and, instead, merely state that the "numerous representations have already been detailed in [various pleadings filed in the district court]". Parties are not permitted to adopt previously filed legal and factual arguments. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) (citing Fed. R. App. P. 28(a)(4)). Because the Torgersons have failed to provide any legal or factual analysis for this ground, it is waived. See United States v. Green, 964 F.2d 365, 371 (5th Cir. 1992), cert. denied, ____U.S. ____, 113 S. Ct. 984 (1993).

C.

The Torgersons contend that Butts was ineffective because he refused to accept the district court's offer to grant a continuance of the sentencing hearing when Butts was surprised by the "Miller letter". Their briefs contain no description of this letter or its contents,[2] and offer no explanation for why they were prejudiced by Butts' failure to accept the offer. They merely assert that they were entitled to an evidentiary hearing on this ground because the "Miller letter" had a substantial effect on the sentencing judge, and because they presented a letter to the district court which contradicted the "Miller letter".

Our court held in their direct appeal that "[t]he existence of [the Miller letter] does not demonstrate that the [district] court was `influenced by impermissible motives or incorrect information'". Accordingly, the Torgersons' have failed again to demonstrate prejudice. See Hill, 474 U.S. at 59. Because the record is adequate to dispose of this ground, an evidentiary hearing was not required.

D.

The Torgersons maintain that Butts was ineffective because he failed to present "numerous other sentencing alternatives available to the Torgersons" as detailed in their Section 2255 motion. Once again, because they failed to provide any legal or factual analysis of this ground, it is waived. See Green, 964 F.2d at 371.

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[2] Our opinion for the Torgersons' direct appeal indicates that the "Miller letter" was written by Miller Leasing, one of the two victims of the Torgersons' scheme.

E.

The Torgersons contend that Butts was ineffective because he did not present "numerous character evidence" at the sentencing hearing. They do not identify that evidence, nor do they explain how it would have affected their sentences. In any event, such tactical decisions do not rise to the level of constitutional violations. See United States v. Hughes, 635 F.2d 449, 453 (5th Cir. 1981). There was no need for an evidentiary hearing on this ground.

F.

Finally, Barbara Torgerson contends that Butts was ineffective for failing to allege that she was incompetent when she pleaded guilty. She apparently contends that she is entitled to an evidentiary hearing because Butts should have filed additional medical records, and states that some of those records were sent directly by her doctor to the district judge.

On direct appeal, our court held that the district court thoroughly and completely evaluated the Torgersons' capacity to plead guilty and their understanding of the charges against them. The medical records Mrs. Torgerson relies on, in support of her evidentiary hearing contention, consist of two test results and a hospital registration form. The form contains no relevant information, and the test results are recounted in other previously submitted medical records. Mrs. Torgerson has not shown prejudice; an evidentiary hearing was not necessary.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.[3]

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[3] The appellants' motion for oral argument is DENIED as moot.

APPENDIX E

U.S. COURT OF APPEALS
FILED
FEB 22 1994
CHARLES R. FULBRUGE, III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VERNON D. TORGERSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

No. 93-8281

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARBARA TORGERSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING

(February 22, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cases be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ BARKSDALE
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE